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Supreme Court, U.S.

FILED

OCT 10 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

v.

W. STEVE SMITH, Trustee,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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October 1990



QUESTIONS PRESENTED

1. Does state law provide an exception to the "mootness doctrine" applied to 11 U.S.C. § 363(m) where a party has been denied his right to a hearing in which to post a supersedeas bond to stay execution pending appeal, and the subject property has been sold pursuant to bankruptcy court order, where applicable state substantive law would have deprived the bankruptcy court of authority to approve the sale, and under relevant state substantive law, the bankruptcy trustee had no legal title to convey, thereby rendering the sale null and void ab initio?

2. Does the right of access to the courts and due process guarantees of the Fifth Amendment ensure appellate review of issues of failure of due process and want of subject matter jurisdiction notwithstanding alleged "mootness" pursuant to 11 U.S.C. § 363(m)?

3. Does 11 U.S.C. § 363(m) override a century of precedent which provides that a sale of property subject to execution for judgment pending appeal does *not* render such appeal moot, as property sold may be recovered?

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IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
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v.

W. STEVE SMITH, Trustee,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT**

OPINIONS BELOW

The Bankruptcy Court's Final Judgment (unpublished) holding against Petitioner on May 11, 1988, is reproduced in the appendix at page C-1. The Bankruptcy Court's Findings of Fact and Conclusions of Law of May 11, 1988 (unpublished) is reproduced in the appendix at page D-1. The Bankruptcy Court's Order Authorizing

Sale Free and Clear (unpublished) entered December 6, 1988, is reproduced in the appendix at page G-1. The District Court's Final Judgment (unpublished) entered November 14, 1989, is reproduced in the appendix at page E-1. The District Court's Opinion on Affirmance of the Bankruptcy Judgment (unpublished) entered November 14, 1989, is reproduced in the appendix at page F-1. The Court of Appeals' opinion on June 12, 1990, entered as an administrative order granting Appellee's Motion to Dismiss Appeal as Moot (unpublished) is reproduced in the appendix at page A-1. The Court of Appeals' denial of Petition for Rehearing and Suggestion for Rehearing En Banc on July 20, 1990 (unpublished) is reproduced in the appendix at page B-1.

JURISDICTION

Bankruptcy Main Case No. 85-00872-H2-5 was commenced by the filing of an Involuntary Petition on February 7, 1985. An Order for Relief was signed on March 28, 1985.

W. Steve Smith, the trustee of United Markets International, Inc., Bankruptcy Main Cause No. 85-00872-H2-5, commenced Adversary No. 85-0375-H1 on April 17, 1985 in United States Bankruptcy Court for the Southern District of Texas, Houston Division, against R. David Legg, et al. alleging fraudulent conveyance of Legg's homestead pursuant to 28 U.S.C. §§ 1334 and 157 and 11 U.S.C. §§ 105, 362, 363, 541, 542, 544, 547, 548, 549 and 550.

The Final Judgment of the Bankruptcy Court in Adversary No. 85-0375-H1 was entered May 11, 1988. Legg's timely Motion for New Trial filed May 20,

1988 was denied, said denial being entered June 5, 1988. Legg's Notice of Appeal was timely filed on June 13, 1988.

The District Court's Final Judgment and Opinion on Affirmance of the Bankruptcy Judgment were entered November 14, 1989. Legg timely filed his Motion for Reconsideration on November 29, 1989. The District Court's denial of said motion was entered on January 11, 1990. Legg's Notice of Appeal was timely filed on February 9, 1990.

The three judge panel of the Court of Appeals entered an order dismissing Legg's appeal as moot on June 12, 1990. Legg timely filed both a Petition for Rehearing and a Suggestion for Rehearing En Banc on June 26, 1990. The court's denial of both the Petition for Rehearing and the Suggestion for Rehearing En Banc was entered on July 20, 1990. This petition has been timely filed within ninety (90) days of the denial of Legg's Petition for Rehearing.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provision of the Constitution of the United States, Fifth Amendment, is reproduced in the appendix at page J-1.

The relevant provisions of Title 11 of the United States Code governing Bankruptcy pertinent hereto, 11 U.S.C. §§ 363(b)(1) and 363(m), are reproduced in the appendix at pages J-1 and J-2.

The relevant provision of the Constitution of the State of Texas, Article XVI, § 50, is reproduced in the appendix at page J-2.

CONSTITUTIONALITY OF AN ACT OF CONGRESS

This case calls into question the constitutionality of an Act of Congress and a state constitutional provision and 28 U.S.C. § 2403 (a) and (b) may be applicable. The United States Court of Appeals for the Fifth Circuit has not certified under 28 U.S.C. § 2403(a) and (b), to the U.S. Attorney General or the Texas Attorney General the fact that the constitutionality of an Act of Congress or state constitution has been drawn into question.

STATEMENT OF THE CASE

An involuntary Chapter 11 petition was filed against United Markets International, Inc. (UMI), a Texas corporation, on February 7, 1985. The original petitioning alleged creditors were Essam Obaid, a Saudi Arabian national, and the Obaid & Almulla Construction Co., Ltd., a Saudi Arabian Company. Legg, Petitioner herein, was the sole owner and officer of UMI. The claims of the two original petitioning alleged creditors were timely controverted. A trial on the controverted involuntary petition was scheduled for March 28, 1985. No such trial was held. The bankruptcy judge entered an order for relief on the basis of a consent decree submitted to the court by counsel for the two petitioning alleged creditors. The consent decree contained no evidence of authorization or verification by the alleged debtor, and counsel for the alleged debtor did not appear in court. This extraordinary extra-judicial act compromised controverted claims in excess of two million dollars. The ex parte entry of the order for relief also provided for the permanent appointment of a trustee of the alleged debtor's "estate."

Trustee W. Steve Smith, Respondent herein, commenced Adversary proceeding no. 85-0375-H1 in United States

Bankruptcy Court against Legg on April 17, 1985, claiming that Legg's homestead residence had been purchased with estate funds with the intent to hinder, delay and defraud creditors; Trustee sought the imposition of a constructive trust upon the real property in which Legg resided, and which he claimed as his homestead. Legg was not the debtor, nor had he filed a claim against the estate in bankruptcy.

Trial of Adversary no. 85-0375-H1 was held January 29 through February 4, 1988, at which Legg objected to the bankruptcy court's jurisdiction to hear the pending case. The bankruptcy court refused to consider the jurisdictional challenge by Legg, held the trial and pronounced judgment in favor of Trustee Smith on May 11, 1988. It is undisputed in the record that the bankruptcy court's findings of fact and conclusions of law imposed a constructive trust on Legg's homestead. *See* Appendix D at pages D-2 through D-3 and D-13.

Legg timely filed a motion for new trial which was denied, said denial being reproduced in the appendix at page H-1. Legg thereafter timely filed his notice of appeal and timely filed a motion for stay of execution of judgment and requested a hearing on the setting of supersedeas bond.

The court failed to respond to Legg's request for stay, did not grant a hearing within which to set supersedeas bond, nor ever ruled on said motion. Legg was forcibly evicted from his homestead property.

Trustee Smith requested bankruptcy court approval to sell the subject property notwithstanding liens and encumbrances pursuant to 11 U.S.C. § 363(b)(1). Legg timely objected and hearing was held on December 6,

1988. At said hearing, Legg informed the bankruptcy court that a ruling was still pending on his request for stay, and that the bankruptcy court's judgment was on appeal. The prospective purchaser (who later acquired the property) was subpoenaed and present at the hearing and was informed of the homestead claim to the property and the lis pendens on file in the deed records of Harris County, Texas. A copy of one of the lis pendens filed by Legg which remains in the county deed records to this date is reproduced in the appendix at page G-4. The bankruptcy court granted Trustee Smith's motion to sell the property free and clear and said order is reproduced in the appendix at page G-1. The property was subsequently sold.

In his appeal to the district court, Legg challenged the jurisdiction of the bankruptcy court to enter a final judgment in Adversary no. 85-0375-H1, in light of the flagrant abuse of due process in the entry of the order for relief. Legg further raised a lack of subject matter jurisdiction of a bankruptcy court to hear said adversary proceeding pursuant to this Court's then newly pronounced opinion in *Granfinanciera v. Norberg*, 492 U.S. ____ (1989), and the cases cited therein. Since Legg was not the debtor and had not filed a claim against the bankruptcy estate, Trustee's claim was a claim in law, not triable before the bankruptcy court. Thus the original petition in said adversary was fatally defective having been filed before a court without subject matter jurisdiction.

Legg further alleged that pursuant to the Constitution of the State of Texas, Art. XVI, § 50, a constructive trust upon a homestead was an invalid lien and null and void

under state law. *Matter of Daves*, 770 F.2d 1363 (5th Cir. 1985). As the invalid lien could confer no rights upon Trustee Smith, he had no rights to convey to any subsequent purchaser, and under the laws of the State of Texas, such sale was void. *Burkhardt v. Lieberman*, 138 Tex. 409, 159 S.W.2d 847 (1942). Trustee Smith's "sale" of the property was a "pretended" sale of the homestead and such a condition of defeasance is void. Tex. Const. art. XVI, § 50.

The district court below never reached these issues though the appeal remained pending for one and a half years. Said court affirmed the bankruptcy court's ruling since the record, although timely designated and ordered by Legg, was not in the Court's record due to inadvertent clerical error. Legg timely requested reconsideration (providing an additional copy of the record) which was denied in the district court's order reproduced herein at page I-1. Legg timely appealed the ruling to the Fifth Circuit. Respondent tried to strike this record at the Fifth Circuit, but it was denied.

In his brief to the Fifth Circuit, Legg again raised these same issues involving void order and lack of jurisdiction in the bankruptcy court. Trustee Smith responded with a motion to dismiss Legg's appeal as moot pursuant to 11 U.S.C. § 363(m), citing that the subject property had been sold and that under the Fifth Circuit's recent ruling in *Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990) there was "no exception" to the mootness doctrine under 11 U.S.C. § 363(m).

The panel granted Trustee Smith's motion and dismissed the appeal. Legg's petition for rehearing was denied. En banc consideration of the issues raised therein was also denied.

REASONS FOR GRANTING THE WRIT

The issues before the court has divided the courts of appeals. That issue is—do considerations of state law create an exception to the mootness doctrine where a stay of execution of judgment is not obtained prior to a sale of the property by a bankruptcy court pursuant to 11 U.S.C. § 363(m)?

This issue was specifically addressed to the Fifth Circuit below, and it granted Appellee's motion to dismiss the appeal as moot. This finding followed the recent Fifth Circuit opinion in *Matter of Gilchrist, supra*. In adopting the "no exception rule" with regard to the application of 11 U.S.C. § 363(m), the Fifth Circuit agreed with the reasoning of the Seventh Circuit's opinion in *Accord In re Sax*, 796 F.2d 994, 997-998 (7th Cir. 1986). Both circuits hold the failure to obtain a stay of execution of judgment on the property as "fatal," rendering moot any appeal in the absence of a stay.

In contrast the Ninth Circuit has recognized that "the substantive rights of parties are created and defined by state law," and that such rights could survive the sale of property in bankruptcy court. *In re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988) at 1173, citing *Butner v. United States*, 440 U.S. 48, 55 (1979).

The Fifth Circuit, in refusing to consider Legg's appeal, refused to apply the state law exception to the mootness doctrine as recognized by the Ninth Circuit. In refusing to consider the invalid nature of the lien wrongfully imposed upon Legg's homestead, and the void nature of the judicial sale of said property, the Fifth Circuit effectively denied Legg his due process rights of access to the courts, and allowed the bankruptcy court, by imposition

of an invalid lien upon homestead property, to override and nullify one of the most sacred protections guaranteed by the Constitution of the State of Texas—the protection of homestead.

The mootness rule incorporated in 11 U.S.C. § 363(m) must be viewed in the light of fundamental due process, and the right of access to the courts as guaranteed by the Fifth Amendment. The case at bar raised fundamental considerations of abuse of process and want of subject matter jurisdiction. To refuse review of allegations of failure of due process and want of jurisdiction, as has been the course of the Fifth Circuit below, is to create by fiat a means of validating void orders, and placing beyond question a review of judicial orders violative of jurisdictional limitations and fundamental guarantees of due process. In the insular world of the bankruptcy courts, where court appointed trustees often plead before the non-Article III jurists who appointed them, without the leavening presence of a jury, the potential for abuse is ever present, and no statute should be allowed to fetter or evade the complete appellate review of any such proceeding.¹

To allow such a statute to stand is to effectively block access to the appellate court, a right guaranteed by the Fifth Amendment.

1. Though not recognizing exceptions to 11 U.S.C. § 363(m) where a stay is not obtained, the Seventh Circuit noted the potential for abuse in *In Matter of Chicago-Milwaukee, St. Paul & Pacific*, 799 F.2d 317 (7th Cir. 1986) at 325: "This rule [11 U.S.C. § 363(m)] increases the chance of error in the process as a whole by making it harder for an appellate court to review the district court's decisions; sometimes the appellate court will act quickly (without adequate information and contemplation), and sometimes, as here, it will not act at all."

This Court has consistently held for over a century that the sale of property in execution of judgment, pending appeal, does not render such appeal moot, as property sold may be recovered. *E.g. Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956); *Porter v. Lee*, 328 U.S. 246 (1946); *Dakota County v. Glidden*, 113 U.S. 222 (1885). A century of precedent illustrates that an appellate court may fashion relief despite execution of the judgment below.

Congress is empowered to enact bankruptcy laws pursuant to Article I, Section 8, clause 4 of the United States Constitution. However, this right is limited by the due process clause of the Fifth Amendment. The present case provides this Court the most complete example of the panoply of Constitutional abuses inherent in the application of 11 U.S.C. § 363(m). In the case below, there were allegations of abuse of process in the bankruptcy court's ex parte entry of an order for relief, which deprived it of any subsequent jurisdiction. Additionally, pursuant to this Court's holding in *Granfinanciera, supra*, Petitioner Legg was guaranteed a right to trial before an Article III judge; he was not a debtor below and had not filed a claim against the estate in bankruptcy, rendering any action against him a plenary cause not triable to a court of equity—grounds for reversal even if raised for the first time on appeal. *Petroleum Exploration v. Public Serv. Com.*, 304 U.S. 209 (1938). Moreover, Legg requested a stay pending a hearing to set a supersedeas bond, but no hearing was ever granted, nor was Legg's motion ever ruled upon by the court below—again a blatant deprivation of due process. Finally, Legg was protected in his homestead rights by the Texas Constitution—rights which survived a forced sale in bankruptcy.

By refusing review of the matter on appeal, the appellate court permitted the "mootness doctrine" incorporated in 11 U.S.C. § 363(m) to validate a void order, confer jurisdiction where there was none, and abrogate the Constitution of the State of Texas.

Petitioner Legg has received abhorrent treatment before the lower courts in large part because he has been cast in the unenviable role of one who must challenge the limited jurisdiction of the bankruptcy court to hear the case at bar. As such challenges are frequently unpopular with the courts, this role is not one which Legg has relished for it has taken its toll on both his personal life and his professional reputation. Whether or not the application of statute should render moot such serious jurisdictional challenges is worthy of review by this Court.

The absence of an opinion below is no bar to review by this Court, it in fact emphasizes the need for such review. Another refusal to act is cited in footnote 1, above. Such refusal at the appellate level is only likely to proliferate as the various circuits hold on to their respective—and disparate—positions.

The questions presented are of profound national significance, far transcending "the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As the practices of bankruptcy courts and bankruptcy trustees occupy an ever-growing role in our judicial system, their practices often conflict with precedent long accepted. 11 U.S.C. § 363(m) provides an "escape hatch" from judicial review and application of substantive rights of state law. Its interpretation and application has deeply divided the appellate courts and

is in conflict with a century of applicable decisions of this Court.

If the "mootness doctrine" of 11 U.S.C. § 363(m) of the Bankruptcy Code is to override applicable state substantive law stating that the bankruptcy court's judgment and sale of the property in question is null and void ab initio, and further, if 11 U.S.C. § 363(m) is to render moot any challenges to a bankruptcy court's subject matter jurisdiction over the initial lawsuit merely because that same court seized and sold the property while a party was denied due process in posting a supersedeas bond, then such is deserving of explanation by the Supreme Court. Supreme Court Rules 10.1 (a) & (c).

CONCLUSION

For the foregoing reasons, Petitioner R. David Legg asks that his petition for certiorari be granted.

Respectfully submitted,

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A-1

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-2174

**IN THE MATTER OF:
UNITED MARKET INTERNATIONAL, INC.,
Debtor.**

**R. DAVID LEGG,
Appellant,**

versus

**W. STEVE SMITH, Trustee,
Appellee.**

**Appeal from the United States District Court for the
Southern District of Texas**

(Filed June 12, 1990)

Before GEE, DAVIS and JONES, Circuit Judges.

BY THE COURT:

**IT IS ORDERED that appellee's motion to dismiss
appeal is GRANTED.**

**/s/ E.H.J.
6/7/90**

**/s/ W.E.D.
6/10/90**

**/s/ T.G.G.
6/15/90**

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APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-2174

**IN THE MATTER OF:
UNITED MARKET INTERNATIONAL, INC.,
Debtor.**

**R. DAVID LEGG,
Appellant,**

versus

**W. STEVE SMITH, Trustee,
Appellee.**

**Appeal from the United States District Court for the
Southern District of Texas**

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(July 20, 1990)

Before GEE, DAVIS and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is **DENIED** and no member of this panel nor Judge in regular active service on the

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Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

C-1

APPENDIX C

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CASE NO. 85-00872-H2-5

ADV. NO. 85-0375-H1

IN RE:

**UNITED MARKETS INTERNATIONAL, INC.,
Debtor**

W. STEVE SMITH, TRUSTEE

v.

**R. DAVID LEGG AND
H.C. HWANG & PARTNERS, INC.**

FINAL JUDGMENT

At Houston came on for trial the above-referenced adversary proceeding, and the Court having considered the record, evidence presented at trial and the arguments of counsel, and based upon the Findings of Fact and Conclusions of Law entered herein, it is therefore

ORDERED, ADJUDGED and DECREED:

1. That the Estate of United Markets International, Inc., by and through its Trustee, W. Steve Smith, is hereby granted a constructive trust on Unit No. 1201, Bayou Bend Towers, to the extent of \$300,000.00 plus interest as provided by law from February 8, 1985. Such con-

structive trust is subject to the valid first lien of H.C. Hwang & Partners, Inc.;

2. That R. David Legg turnover possession of Unit No. 1201, Bayou Bend Towers on or before May 30, 1988 to the Trustee W. Steve Smith, for the benefit of the Estate, and that further, all fixtures and improvements located in Unit No. 1201 of Bayou Bend Towers also be turned over to the Trustee;

3. The Court has determined that H.C. Hwang & Partners, Inc., are prohibited from foreclosure under the provisions of 11 U.S.C. § 362 unless and until the stay should lift since any foreclosure would cut off the rights of the Estate in the condominium. It is further

ORDERED, that all other issues regarding any fraudulent transfer, preference, unpaid tax, maintenance fee or other claim against R. David Legg not addressed herein is to be determined separately.

SIGNED this 11th day of May, 1988.

/s/ R. F. WHELESS, JR.
R. F. Wheless, Jr.
U. S. Bankruptcy Judge

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APPENDIX D

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**CASE NO. 85-00872-H2-5
(Chapter 11)**

ADVERSARY NO. 85-0375-H1

IN RE:

**UNITED MARKETS INTERNATIONAL, INC.,
Debtor**

W. STEVE SMITH, TRUSTEE

vs.

**R. DAVID LEGG AND
H. C. HWANG PARTNERS, INC.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 11, 1988)

D-2

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This adversary is one in which Steve Smith as Trustee of United Markets International, Inc. ("UMI") asserts a constructive trust in a condominium described as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas ("the condominium") on the ground that on February 8, 1985, R. David Legg, as president, chief executive officer and sole shareholder of UMI caused Banc-Texas Northside to cancel two (2) certificates of deposit in the name of UMI and apply the proceeds on a debt of Bayou Bend Realty, Inc. ("Realty") incurred in the purchase of the involved condominium. The Trustee contends that UMI was insolvent at the time of the transfers

and that the transfer was done with the intent of Legg to hinder, delay and defraud creditors of UMI and without consideration to UMI. At all material times Legg has lived in the condominium and claims it as his own and as his homestead. Legg had previously caused UMI to put up two (2) \$150,000.00 C.D.'s as security for a \$300,000.00 loan from BancTexas Northside, the proceeds of which loan were used in the acquisition of the involved condominium in the name of Bayou Bend Realty, Inc.

Trial was held before the Court beginning January 29, 1988. The trial concluded February 24, 1988. Based upon the evidence, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. At all material times, R. David Legg was the sole shareholder and director of United Markets International, Inc. ("UMI") since the incorporation of UMI.
2. In October or November 1984, R. David Legg incorporated a separate entity by the name Bayou Bend Realty, Inc. At that time, he intended to be the sole shareholder, director and officer of Bayou Bend Realty, Inc.
3. At all material times R. David Legg had complete control of all of the assets of UMI and Bayou Bend Realty, Inc.
4. In part, R. David Legg conducted business by and through the corporate entities of UMI and Bayou Bend Realty, Inc.
5. During the period from the incorporation of Bayou Bend Realty, Inc. to February 7, 1985, both Bayou Bend

Realty, Inc. and UMI had one or more creditors, each of whose claims were still in existence on February 7, 1985.

6. In October 1984, R. David Legg caused \$300,000.00 to be transferred from the bank accounts of UMI to BancTexas Northside.

7. The \$300,000.00 that was transferred to BancTexas Northside was placed into two (2) \$150,000 certificates of deposit in the name of UMI.

8. On or about November 20, 1984, R. David Legg caused the two (2) \$150,000.00 certificates of deposit to be pledged to secure a note executed by Bayou Bend Realty, Inc. in the amount of \$300,000.00.

9. The aforementioned pledge was in connection with the purchase by Bayou Bend Realty, Inc. of certain real property ("the condominium") described as unit no. 1201, Bayou Bend Towers, Houston, Harris County, Texas. The purchase of the condominium was from H. C. Hwang & Partners, Inc. ("Hwang"). The consideration to Hwang for the purchase of the condominium included \$310,000.00 cash and a promissory note executed by Bayou Bend Realty, Inc. in the amount of \$115,000.00. The \$310,000.00 cash paid by Realty to Partners were proceeds of a loan in a like amount from BancTexas Northside Houston, which loan had been secured by the two (2) UMI certificates of deposit in the amount of \$150,000.00 each.

10. At all material times R. David Legg intended for unit no. 1201 (the condominium) for his own use though title was initially taken in the name of Bayou Bend Realty, Inc.

11. No certificates of stock to Bayou Bend Realty, Inc. were ever issued.

12. On January 25, 1985, R. David Legg caused Bayou Bend Realty, Inc. to transfer the condominium to R. David Legg.

13. R. David Legg recorded the transfer with the Harris County Clerk's office on January 25, 1985.

14. The promissory note to Hwang in the amount of \$115,000.00 matured November 29, 1985. Legg has never made any payments on this note.

15. On February 8, 1985 Legg caused UMI certificates of deposit to be cashed and applied to the balance due on the \$300,000.00 note executed by Bayou Bend Realty to BancTexas Northside.

16. The transfers by pledge to secure the loan from BancTexas Northside and the subsequent cancellation of the certificates of deposit and their application on the indebtedness were caused to be made by Legg with the actual intent to hinder, delay and defraud the creditors of UMI.

17. UMI received no benefit or consideration in return for the pledge of its certificates of deposit nor the application of the proceeds of such certificates of deposit (in the amount of approximately \$300,000.00) on the purchase price of the involved condominium.

18. H. C. Hwang & Partners, Inc. has a first lien in the amount of \$115,000, interest, and attorneys fees on the real property known as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas.

19. R. David Legg has had free use, control and pos-

session of Unit No. 1201 of Bayou Bend Towers without paying rent, taxes or assessment fees since January 1985.

20. Neither R. David Legg nor Bayou Bend Realty, Inc. has made any payment of principal or interest owing under that certain Real Estate Lien Note dated November 29, 1984, and said Note is now due, owing and payable in its entirety to H. C. Hwang & Partners, Inc.

21. UMI was undercapitalized from the date of its incorporation.

22. UMI's sole source of income during the year prior to February 1985 was the procurement contract between it and Obaid & Alnullah Construction Company ("OBALCO").

23. On or about April 25, 1983 UMI entered into a contract with OBALCO for the procurement and shipping of furniture, fixtures and equipment to the Army Engineering College at King Khaled Military City, Haf'r Al Batin, Saudi Arabia, a construction project on which OBALCO was the prime contractor.

24. In April 1983 UMI had virtually no credit history. It was having difficulty in the initial procurement of goods for the contract. As of November 1983 UMI had only been able to purchase about \$150,000.00 worth of goods on open credit.

25. On or about December 3, 1983 an employee of UMI submitted falsified documents to Texas Commerce Bank in order to draw \$700,000.00 on the letter of credit.

26. On receipt of the falsified documents Texas Commerce Bank allowed UMI to draw \$700,000.00 (discounted).

27. At that time UMI had actually shipped to OBALCO materials worth only \$18,098.53. The documents had been altered to indicate that \$700,000.00 worth of goods had been shipped.

28. On or about January 10, 1984 an employee of UMI caused falsified documents to be submitted to Texas Commerce Bank in order to effect a draw of \$3,000,000.00 on the letter of credit which had been established in conjunction with the involved contract.

29. UMI received the \$3,000,000.00 (discounted) from Texas Commerce Bank upon presentation of shipment documents showing that \$3,000,000.000 in goods related to the contract had been shipped to OBALCO.

30. In truth and in fact on January 10, 1984 UMI had shipped to OBALCO materials worth only \$102,855.51. The documents had been altered to indicate that the value of such goods was \$3,000,000.00.

31. Legg contends that these draws, totalling \$3,700,000.00 in exchange for shipment of goods worth only about \$120,000.00 had been authorized by Essam Obaid, one of the partners in the Obaid and Almullah Construction Co. (OBALCO).

32. Mr. Legg further denies that he had any knowledge that documents had been falsified in order to obtain these draws. UMI was a small company. It was under the control of Legg.

33. The essence of Mr. Legg's testimony is that he knew that only \$120,000.00 in goods had been shipped and that he knew that UMI was drawing \$3,700,000.00 against that shipment but his contention is that Essom Obaid had agreed to this and that the employee, Mr.

Richard Britt took it on himself to falsify these documents in order to obtain the \$3,700,000.00.

34. Mr. Legg admits that he told Richard Britt to prepare the necessary papers to take to the bank to obtain these draws.

35. Mr. Richard Britt cannot be located.

36. By February 1984 OBALCO became aware that only \$120,000.00 worth of goods had been shipped against a draw of \$3,700,000.00.

37. Subsequently, as a result of various negotiations, Legg caused UMI to return 2.5 million to OBALCO by the opening of an account in a local bank in such amount. Legg contends that the account was a joint account but the account was in the name of OBALCO and only OBALCO had the right to write checks against the account.

38. In an effort to salvage the contract (UMI was at that time overdrawn by \$1,000,000.00) OBALCO arranged for half a million dollar line of credit to UMI through the Bank, First City Bank Westheimer Plaza.

39. UMI was to purchase goods through use of the revolving half million dollar line of credit and to repay the line of credit out of the proceeds received from the shipment of goods.

40. Thereafter UMI made two (2) additional shipments of goods worth \$541,505.00 and \$522,549.00, respectively.

41. Legg contends that these shipments caused UMI to have a "profit" of \$300,000.00 from these shipments and that this \$300,000.00 is what he used to acquire (in

part) the involved condominium. This position of Legg *ignores* the fact that UMI was already overdrawn on the contract by \$1,000,000.00 at the time of these latter two shipments in September and October, 1984.

42. Since obtaining the \$3,700,000.00, Legg had withdrawn or caused to be withdrawn substantial sums of money from UMI for various purposes and reasons, including payments to and for the benefit of Legg and also in the form of draws; all in addition to the \$300,000.00.

43. At February 7, 1984 UMI was unable to complete the contract and had no realistic hope of doing so. R. David Legg was aware of this condition of the company and its performance.

44. In early December 1984 OBALCO had indicated a desire that UMI accelerate its performance of the contract. OBALCO was unsatisfied with the meager shipments which had occurred to that date.

45. Various meetings were held in January 1985 concerning performance of the contract. Legg contends that he executed a deed to the condominium from Bayou Bend Realty to himself on January 25, 1985 because of various threats of Obaid.

46. On February 7, 1985 representatives of OBALCO tendered to Legg and UMI a letter of termination of UMI's contract. Further, Legg alleges that these representatives demanded that he release all funds in the "joint" account at First City Bank Westheimer Plaza, at that time.

47. Legg admits that on the following morning he visited the offices of BancTexas Northside, withdrew the certificates of deposit belonging to UMI (which were not

then mature) and paid off the interest and principal of the second lien indebtedness on the condominium owed to BancTexas Northside.

48. Legg contends that OBALCO wrongfully terminated the contract without prior notice, on the ground that UMI was entitled to written notice and fifteen days to cure any default. This Court finds that UMI was in no position to have cured any of its defaults under the involved contract and that fifteen days notice and opportunity to cure would not have been to any benefit to UMI as it was not in a position to be able to cure its defaults. At such time UMI had insufficient funds to complete the contract and no availability of credit and was still substantially overdrawn on the contract.

49. UMI made a final shipment to OBALCO under the contract on January 10, 1984 with materials worth \$102,855.51.

50. UMI was unable to complete its contract with OBALCO as of February 7, 1985.

51. If UMI had received fifteen days notice and an opportunity to cure its defaults under the contract with OBALCO, it would not have been able to cure such defaults.

52. R. David Legg knew at the time he caused the \$300,000.00 of UMI's funds to be pledged for the condominium debt that UMI was unable to complete the contract with OBALCO.

53. At the time R. David Legg caused the \$300,000.00 of UMI's funds to be applied toward the indebtedness owed on the purchase of the condominium R. David Legg knew that UMI would be unable to complete

the contract with OBALCO for want of the necessary money, credit, or other resources.

54. R. David Legg did receive and use funds of UMI for his own personal benefit during the period beginning in October 1983 and thereafter and at times at which UMI was insolvent.

55. On February 8, 1985 at the time Legg caused the cancellation of the C.D.'s and the application of the proceeds on the condominium debt, Legg contends that he did not know of the filing of the involuntary petition of February 7, 1985.

56. This Court does not accept Mr. Legg's credibility in connection with this matter.

57. Without question Legg knew that OBALCO wanted an expedited delivery schedule. Legg also knew that UMI could not perform the OBALCO contract. UMI had overdrawn on the contract by approximately \$1,000,000.00 (after the return of the \$2,500,000.00). Mr. Legg had removed approximately \$1,000,000 from UMI in one fashion or another. UMI was then and there in debt to the Bank by \$500,000.00. The overhead necessary to complete the contract was at the rate of from \$25,000 to \$50,000 per month depending on whether Legg made further withdrawals. Thus, the direct cost of the furniture, fixtures and equipment to be shipped could not (realistically) be reduced further. The cost of completing the contract exceeded the amount left in the contract. UMI still had to deliver the balance of goods called for by the contract. UMI had a substantial obligation to OBALCO which it could not perform.

58. On February 7, 1985 (as at all other material

times) UMI was insolvent in that its liabilities exceeded its assets.

59. The various transfers of the \$300,000.00 including the securing and the payment of the condo debt, were without consideration to UMI.

CONCLUSIONS OF LAW

1. R. David Legg breached his fiduciary duty to the creditors of UMI by pledging assets and converting funds of assets (a) at times when UMI was insolvent and (b) with the actual intent to hinder and delay and defraud creditors of UMI.

2. The estate of UMI is entitled to a constructive trust on Unit No. 1201 (the condominium) subject to any valid prior existing liens and encumbrances.

3. The estate of UMI is entitled to a judgment against R. David Legg for \$300,000.00 plus interest for the period beginning January, 1985 and continuing until paid for the funds of UMI applied to the purchase of the condominium and for an amount equal to the taxes and maintenance assessments that are now due and owing on the condominium.

4. The Trustee of UMI has requested an injunction against H. C. Hwang and Partners, Inc. to prevent it from foreclosing its lien until the Trustee has a reasonable time to affect the sale of the involved condominium. This Court would issue such an injunction, however, under the decision contained herein for H. C. Hwang & Partners, Inc. to attempt to foreclose its first lien at this point (which would effectively cut off the rights of the estate in and to the condominium) would be a violation of 11 U.S.C. 362.

5. R. David Legg should be and is hereby ordered to turnover possession of Unit No. 1201 of Bayou Bend Towers forthwith and that all furniture, fixtures and improvements located in Unit No. 1201 of Bayou Bend Towers acquired with funds of UMI also be turned over to the Trustee.

6. W. Steve Smith, Trustee of the Estate of UMI, is entitled to a detailed accounting from R. David Legg of all funds received, transferred, or removed from UMI for whatever purpose, including salary, dividend, loan, payment for services rendered (legal or otherwise), with a statement of the date and amount of such withdrawals and the purpose thereof, including such sums that were used for the purchase, furnishing, maintenance, or investment in the townhome or condominium known as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas.

7. Any claim of homestead of R. David Legg is subject to the constructive trust of this estate, under the law.

8. This is a core matter under 28 USC 157 as the proceeding is based upon 11 USC 548, therefore, arises under Title 11, 11 USC 157 (b)(2)(H).

9. Where the context permits, or as necessary, all findings of fact are to be considered conclusions of law and all conclusions of law are to be considered findings of fact.

DATED: May 11, 1988.

/s/ R. F. WHELESS, JR.

R. F. Wheless, Jr.

United States Bankruptcy Judge

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APPENDIX E

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. H-88-2293

Adversary No. 85-1375-H1

Bankruptcy Case No. 85-00872-H2-1

IN RE:

UNITED MARKETS INTERNATIONAL, INC.

W. STEVE SMITH, TRUSTEE,

vs.

**R. DAVID LEGG and
H. C. HWANG & PARTNERS, INC.,**

(Entered November 14, 1989)

FINAL JUDGMENT

The judgment of the bankruptcy court is affirmed.

It is adjudged that:

1. The estate of United Markets International, Inc., by its Trustee, W. Steve Smith, is granted a constructive trust on Unit No. 1201, Bayou Bend Towers, Volume 117, page 24, Condominium Records, Harris County, Texas, to the extent of \$300,000.00, plus interest at 10% per year from February 5, 1985, to today, with the constructive trust being subject to the lien of H. C.

Hwang & Partners, Inc.; the principal and prejudgment interest shall bear postjudgment interest at 7.90% per year.

2. R. David Legg shall deliver possession of Unit No. 1201, Bayou Bend Towers, by May 30, 1988, to the Trustee W. Steve Smith for the benefit of the Estate including all fixtures and improvements in the unit;

3. H. C. Hwang & Partners, Inc., is prohibited from foreclosure under 11 U.S.C. § 362 unless the stay should lift; and

4. All issues about fraudulent transfer, preference, unpaid tax, maintenance fee, or other claim against R. David Legg not expressly addressed in this judgment will be determined separately.

This is a final judgment.

Signed on November 9, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX F

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. H-88-2293

Adversary No. 85-1375-H1

Bankruptcy Case No. 85-00872-H2-1

IN RE:

UNITED MARKETS INTERNATIONAL, INC.

W. STEVE SMITH, TRUSTEE,

vs.

**R. DAVID LEGG and
H. C. HWANG & PARTNERS, INC.**

(Entered November 14, 1989)

**OPINION ON AFFIRMANCE OF
THE BANKRUPTCY JUDGMENT**

The appellants' emergency motion to vacate judgment on appeal for failure to join indispensable parties will be denied.

The insufficiency of evidence point of error cannot be ruled on by this court because the appellant did not submit the record; therefore, the findings of fact and conclusions of law of the trial court will stand.

The appellant seriously misunderstands the indispensable party rule which is not applicable here because no other party's interests were either decreased or diminished by the occasion of this lawsuit and its judgment.

The constructive trust will be affirmed. There is a quibble about the use of the term "first." The constructive trust is subordinate to Hwang's lien whether that lien was the first or the fifteenth. Even if the language causes confusion, it is surplusage; otherwise, the order will stand.

Signed on November 9, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

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APPENDIX G

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CASE NO. 85-00872-H2-5

ADV. NO. 85-0375-H1

IN RE:

**UNITED MARKETS INTERNATIONAL, INC.,
Debtor**

W. STEVE SMITH, TRUSTEE

v.

**R. DAVID LEGG AND
H. C. HWANG & PARTNERS, INC.**

ORDER AUTHORIZING SALE FREE AND CLEAR

At Houston came on for hearing the Motion For Authority To Sell Free and Clear filed by W. Steve Smith, Trustee herein, and R. David Legg having filed an apposition to such Motion, and the Court having considered the evidence presented and the arguments of counsel, and determining that the Motion should be in all respects granted, it is therefore

ORDERED that W. Steve Smith, Trustee for the Estate of United Markets International, Inc., is hereby authorized to sell Unit 1201 of Bayou Bend Towers, 101 Westcott, Houston, Harris County, Texas, for the cash price of \$275,000.00 to Mr. Gideon G. Agar (pursuant to con-

tract dated Nov. 3, 1988) and that any interest that any party might claim in the subject condominium be attached to the net proceeds from said sale, said claims including but not being limited to:

1. Lien in favor of H.C. Hwang & Partners, Inc. securing a promissory note in the original principal sum of \$115,000.00;
2. Lien filed August 2, 1988, in favor of The Bayou Bend Towers Council of Co-owners, in the amount of \$15,475.95;
3. Lien filed August 26, 1987, in favor of West Publishing Company against R. David Legg in the amount of \$2,727.40;
4. Lien filed August 31, 1987, in favor of The Bayou Bend Towers Council of Co-owners, in the amount of \$17,622.83;
5. Lien filed August 24, 1988, in favor of Matthew Bender & Company, Inc. in the amount of \$1,558.88;
6. Federal lien filed on October 26, 1988, against Robert David Legg in the amount of \$7,722.01;
7. State Tax Lien filed July 15, 1985, in favor of Comptroller of Public Accounts, State of Texas, in the amount of \$64.02;
8. Claims asserted by R. David Legg in Adversary Proceeding No. 85-0375-H1 in the United States Bankruptcy Court of the Southern District of Texas;

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9. Claims asserted by any party in the lawsuit styled R. David Legg vs. Lackshin & Nathan, et al., Docket No. 88-54225, in the 127th Judicial District of Harris County, Texas; and
10. Claims of R. David Legg that are asserted in the Notice of Lis Pendens filed on August 5, 1988, by R. David Legg, a copy of which is attached hereto as Exhibit "A".

it is further

ORDERED that all of the claims and interests that all parties might have against the net proceeds of the sale of this property are not approved herein, but are subject to determination in the appropriate forum and proceeding prior to disbursement of the net proceeds from the sale of Unit 1201, Bayou Bend Towers, Houston, Harris County, Texas; it is further

ORDERED that unless the time is shortened for cause shown, this Order and its effect is conditioned upon the Trustee giving 20 days written notice to West Publishing Company, Matthew Bender Publishing Company and the I.R.S., and giving each of these creditors the opportunity to object or request a hearing. If none is requested then the full effect of this Order shall mature.

Dated: December 6, 1988.

/s/ R. F. WHELESS, JR.
United States Bankruptcy Judge

STATE OF TEXAS *
COUNTY OF HARRIS *

NOTICE OF LIS PENDENS

Notice is hereby given that in the United States District Court for the Southern District of Texas, Houston Division, there is pending a Civil Action entitled R. David Legg vs. W. Steve Smith, Trustee. By that suit R. David Legg asserts that certain property is his homestead under the laws of the State of Texas, and is exempt from the claims of creditors. Legg asserts the invalidity of any claims of said property being property of an estate of an alleged debtor entitled United Markets International, Inc., said estate being administered by W. Steve Smith, Trustee.

Further notice is hereby given that there is pending before the United States Court of Appeals for the Fifth Circuit, an appellate cause of action No. 88-2721 entitled United Markets International vs. Essam Obaid et al. In this action, appellant asserts as void an Order in bankruptcy entering an Order for Relief, and asserts as void the appointment of W. Steve Smith as Trustee.

The property in question with regard to these proceedings is described as:

UNIT NUMBER 1201, BAYOU BEND TOWERS,
HOUSTON, HARRIS COUNTY, TEXAS.

The return of said property to its rightful owner of record, R. David Legg is sought in both said proceedings.

Signed this 5th day of August, 1988.

/s/ R. DAVID LEGG

R. David Legg

Attorney for United Markets
International, Inc., and Pro Se
Counsel for R. David Legg

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STATE OF TEXAS *

COUNTY OF HARRIS *

BEFORE ME, the undersigned authority personally appeared R. David Legg, Attorney for United Markets International, Inc., and Pro Se Counsel for R. David Legg, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 5th day of August, 1988.

/s/ CAROL WADE WILSON
Notary Public in and for the
State of TEXAS

My commission expires:

12-31-88

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APPENDIX H

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**CASE NO. 85-00872-H2-5
CHAPTER 11**

ADVERSARY NO. 85-0375-H1

IN RE:

**UNITED MARKETS INTERNATIONAL, INC.
DEBTOR**

W. STEVE SMITH, TRUSTEE

vs.

**R. DAVID LEGG AND
H.C. HWANG & PARTNERS, INC.**

ORDER

Came on Movant R. David Legg's Motion for New Trial and Request for Hearing, and the Court finding that good and sufficient cause exists for granting same, hereby GRANTS said Motion. Hearing shall be scheduled for the ___ day of _____, 1988, and Movant shall notify all parties.

SIGNED this ___ day of _____, 1988.

June 5, 1988.

DENIED

**/s/ R. F. WHELESS, JR.
Judge Presiding**

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APPENDIX I

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

CIVIL ACTION NO. H-88-2293

Adversary No. 85-0375-H1

IN RE:

**UNITED MARKETS INTERNATIONAL, Inc.
W. STEVE SMITH**

versus

**R. DAVID LEGG and
H. C. HWANG & PARTNERS, Inc.**

(Entered January 11, 1990)

ORDER

**R. David Legg's motion to reconsider is denied.
Signed on January 9, 1990, at Houston, Texas.**

**/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge**

APPENDIX J

**RELEVANT PROVISIONS OF THE CONSTITUTION
OF THE UNITED STATES, UNITED STATES CODE
AND CONSTITUTION OF THE STATE OF TEXAS**

**FIFTH AMENDMENT TO
THE CONSTITUTION OF THE UNITED STATES:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE PROVISIONS:

11 U.S.C. § 363(b)(1):

The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(m):

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of such a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Constitution of the State of Texas, Article XVI, § 50:

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of the purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and materials are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such a manner as prescribed by law. No mortgage shall ever be valid except for the purchase money therefore, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void.

DEC 21 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 90-646

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IN THE
Supreme Court of the United States
OCTOBER TERM 1990

IN THE MATTER OF UNITED
MARKETS INTERNATIONAL, INC., Debtor
R. DAVID LEGG,

Petitioner

vs.

W. STEVE SMITH, Trustee,

Respondent

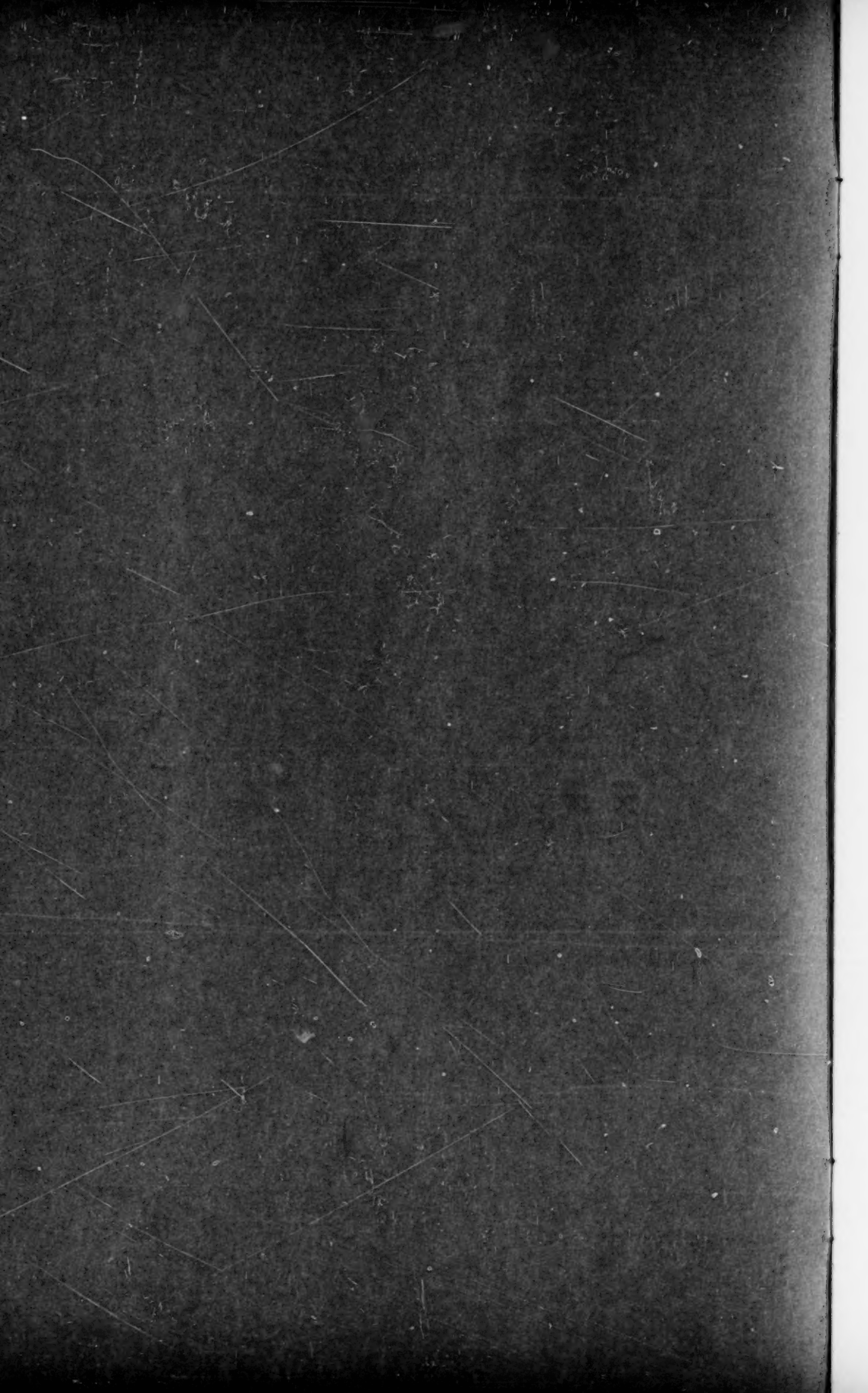
**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

W. STEVE SMITH
WOODARD, HALL & PRIMM,
P.C.
7000 Texas Commerce Tower
Houston, Texas 77002
713/221-3935

(Application
for Admission
pending)

Counsel of Record

Attorney for Respondent,
W. STEVE SMITH, Trustee



**RESPONDENT'S RESTATEMENT OF QUESTIONS
PRESENTED**

1. Does state law provide an exception to the "mootness doctrine" applied to 11 U.S.C. § 363(m) where a party has failed to appeal or seek stay of a bankruptcy court order authorizing sale of property and the property has been sold pursuant to such order?

2. Has Appellant been denied any right of access to the courts and any due process guarantees because of the "mootness doctrine" of 11 U.S.C. § 363(m)?

3. May property be recovered if sold pursuant to order which is not appealed or stayed?

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IN THE
Supreme Court of the United States
OCTOBER TERM 1990

IN THE MATTER OF UNITED
MARKETS INTERNATIONAL, INC., Debtor
R. DAVID LEGG,

Petitioner

vs.

W. STEVE SMITH, Trustee,

Respondent

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

**SUPPLEMENT TO PETITIONER'S LIST OF
OPINIONS BELOW**

The opinion of the Circuit Judge sitting as a District Judge by designation in appointing a trustee is unpublished (App. A).

The Order for Relief and Appointment of a Trustee is unpublished (App. B).

The opinion of the district court upholding the Order for Relief is unpublished (App. D).

The opinion of the United States Court of Appeals for the Fifth Circuit upholding the Order for Relief is unpublished (App. F).

The opinion of the district court upholding the Order for Relief and Sanctions is unpublished (App. G and App. H).

The opinion of the district court denying Petitioner's Temporary Restraining Order request is unpublished (App. L).

The Final Judgment and opinion of the district court holding against Petitioner on constructive trust dated November 9, 1989 are unpublished (App. O).

The Bankruptcy Court's Order Authorizing Sale Free and Clear of the condominium unit, dated December 6, 1988, is unpublished (App. Q).

The Agreed Order dated June 18, 1989 of the Bankruptcy Court pertaining to the disposition of net sales proceeds is unpublished (App. R).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). All other allegations and statements of Petitioner in his "Jurisdiction" paragraph will be addressed in Respondent's "Statement of the Case".

ADDITIONAL STATUTES INVOLVED

11 U.S.C. § 363(e) provides:

Notwithstanding any other provision of this section, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

STATEMENT OF THE CASE

Respondent has since 1988, without success, pursued the overturning of the Bankruptcy Court's Order for Relief dated

March 28, 1985. Among many of his other contentions, Petitioner contends there is no jurisdiction for the judgments impressing a constructive trust upon Unit No. 1201, Bayou Bend Towers, Houston, Texas (the "condo"), Petitioner contends there is no jurisdiction for sanctions awarded against him and Petitioner contends there is no jurisdiction to order the condo sold and the proceeds distributed because the Order for Relief should be set aside. However, the Order for Relief has been upheld at the Bankruptcy Court level, the District Court level and the Circuit Court level. By his Petition to this Court, Petitioner intends to collaterally attack the Order for Relief once again. To show this attempt, as well as to present a fair, accurate history of the relevant portions of the case, requires this restatement and/or supplement by Respondent.

On February 7, 1985, an involuntary petition was filed against UMI. UMI is a Texas corporation, the principal officer and sole shareholder of which is R. David Legg ("Legg").

Thereafter, a hearing was held on a related Motion to Appoint Trustee, or in the Alternative, an Examiner. By order dated February 27, 1985, the Court appointed W. Steve Smith ("Trustee") as trustee of UMI due to:

(1) ... a sufficient showing of fraud, dishonesty, incompetence and gross mismanagement of the affairs of UMI; and

(2) the principal asset of UMI may be a cause of causes of action against ... Legg, ... for, *inter alia*, monies transferred to him or on his behalf from UMI.

(App. A, A-1 through A-3).

On March 28, 1985, an Order for Relief and Appointment of a Trustee was signed. (App. B, B-1).

No appeal of the first Order (February 27, 1985) has ever been taken, and the appeal of the second, the Order for Relief, was not noticed until May 5, 1988, well after conclusion of the trial in Adversary Proceeding No. 85-0375 and just six days before entry of the Final Judgment which impressed a constructive trust upon property Legg claims as homestead. (App. C, C-1).

By Order dated July 7, 1988, the 1988 appeal of the 1985 Order for Relief was dismissed for lack of jurisdiction due to Legg's three year delay in commencing his appeal. (App. D, D-1 through D-3).

Legg appealed this Order to the Fifth Circuit on the same issues as presented to the District Court. (App. E, E-1). The Fifth Circuit affirmed the District Court Order in its Per Curiam Order dated December 2, 1988. (App. F, F-1 through F-3). That Court further cautioned Legg against further frivolous pleadings or appeals. (App. F, F-3).

In spite of this admonishment, Legg unsuccessfully continued his efforts to obtain a vacation of the Order for Relief at the Bankruptcy Court and District Court level via Fed.R.Civ.P. 60(b). (App. G, G-1 through G-4 and App. H, H-1 through H-3). The District Court has consistently upheld the Order for Relief and found Legg's efforts to be frivolous. (App. H, H-3). The Fifth Circuit will be able to re-visit this matter due to Legg's appeal in one of the civil actions. (App. I, I-1).

Trustee did commence Adversary Proceeding No. 85-0375-H1 against Legg and others seeking to recover \$300,000.00 of UMI funds misappropriated by Legg, through another of his controlled corporate entities, Bayou Bend Realty, Inc., in the purchase of the condo. With knowledge that the bankruptcy action would be filed, title to the condo was subsequently transferred from Bayou Bend Realty, Inc. to Legg. The relief requested by Trustee was not, as stated by Legg, based upon

"fraudulent conveyance of Legg's homestead", but was rather to recover the \$300,000.00 used to acquire the condo, which, allegedly, later became the homestead of Legg. In neither of Legg's Answer nor Legg's First Amended Answer to Trustee's complaint did Legg raise any jurisdictional impediment or defense nor did Legg request a jury trial. (App. J, J-1 through J-11).

Following trial, the Bankruptcy Court entered its Findings of Fact and Conclusions of Law (See Appendix D to Legg's Petition for Writ of Certiorari, D-12 and D-13) concluding that the UMI estate is entitled to a constructive trust upon the condo for an amount in excess of \$300,000.00 and that any homestead claim of Legg is subject to such constructive trust. Final Judgment was entered imposing the constructive trust on the condo. (See Appendix C to Legg's Petition for Writ of Certiorari, C-1 and C-2). Although titled Final Judgment, this judgment was granted upon request of Trustee for entry of final judgment as to one or more but fewer than all of the claims asserted. The Bankruptcy Court in entering final judgment as to imposition of a constructive trust upon the condo ordered that all other issues raised which were not addressed by this Final Judgment would be addressed and determined separately (C-2). In fact, by Order in this adversary proceeding dated May 11, 1988, the same date as the Final Judgment, Bankruptcy Judge Wheless addressed one of these other issues ordering Legg to provide an accounting to Trustee by June 11, 1988. (App. K, K-1 and K-2).

Legg attacked the Final Judgment in both his Motion for New Trial in the Bankruptcy Court and in his subsequent appeal to the District Court on jurisdictional grounds (that the Order for Relief was void). On appeal, Legg added the homestead contention as a basis for reversal. As part of his appeal of the Final Judgment to the District Court, Legg sought a temporary restraining order to restrain imposition of a constructive trust upon the condo or foreclosure or judicial sale of the condo. (App. L,

L-1 through L-3). District Judge Hughes denied the request as a "duplicitous attempt to circumvent orders" of District Judge Black on similar requests of Legg in Civil Action No. H-88-1706. (App. M, M-1). Legg then filed his Motion requesting the District Court to stay execution of the Bankruptcy Court's Final Judgment pending hearing to set bond or security. (App. N, N-1 through N-5). Trustee is not aware of any motion to the Bankruptcy Judge for stay of the judgment. However, Legg did file in the Bankruptcy Court, contemporaneously with the filing of the Motion in District Court to stay execution, a motion to recuse Bankruptcy Judge Wheless. (App. O, O-1 through O-3). On November 9, 1989, the District Court affirmed the Bankruptcy Court's Final Judgment by its Final Judgment (which also excepted out all remaining issues in the adversary proceeding for separate determination). (App. P, P-1 through P-3).

Legg's Fed.R.Civ.P. 59 and 60 motion for reconsideration of the District Court affirmance, as well as his subsequent notice of appeal, were premised on *another* collateral attack on the Order for Relief and on the ground that the Bankruptcy Court lacked jurisdiction of this adversary proceeding because of this Court's pronouncement in *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989). (App. Q, Q-1 through Q-3 and Q-6 and Q-7).

During the pendency of the appeal in the District Court, Trustee filed his motion in the same adversary, Adversary No. 85-0375-HI, seeking authority to sell the condo. Legg opposed the Motion. Following a hearing, the Court, by order dated December 6, 1988, authorized Trustee to sell the condo to Gideon G. Agar with a transfer of the various claims against the condo, including Legg's, to the proceeds of sale. (App. R, R-1 through R-5). Legg did not appeal that Order or seek stay or other relief, under § 363(e) or otherwise. The sale was conducted on January 30, 1989. Pursuant to Agreed Order dated June 18, 1989, the net sales proceeds of \$225,311.06 were distributed in partial payment

(\$157,500) of the first lien never paid by Legg on the condo, in partial payment (\$24,000.00) of the homeowner assessments never paid by Legg in regard to the condo, and in partial payment (\$46,500.00 plus some slight interest accrued) of the \$300,000.00+ constructive trust and conversion claim against Legg. (App. S, S-1 through S-4).

Trustee filed his motion to dismiss as moot Legg's appeal to the Fifth Circuit of the District Court's affirmance of the Final Judgment. This was granted by Order filed June 12, 1990. (See Appendix A to Legg's Petition for Writ of Certiorari).

REASONS FOR REFUSING THE WRIT

Legg made absolutely no effort to appeal the very Order he now complains of and which he seeks to collaterally attack in this Court — the Order of the Bankruptcy Court dated December 6, 1988 authorizing Trustee's sale of the condo (App. R). His appeal of either of the judgments imposing the constructive trust upon the condo (Appendix C, C-1 of Petitioner's Petition and App. P) does not excuse his failure to appeal the order authorizing the sale or make such Order any less final. Bankruptcy Rule 8002. Both the Bankruptcy Court and the District Court made clear their respective Final Judgments, in the adversary commenced as No. 85-0375, were only as to the constructive trust portion of Trustee's Complaint, and reserved for other final judgment the other issues, e.g., the accounting, the sale, judgment against Legg, etc. The order of December 6, 1988 authorizing the sale of the condo to Mr. Agar is a final order. *Matter of Kaiser*, 791 F.2d 73 (7th Cir. 1986); *Sulmeyer v. Karbach Enterprises*, 715 F.2d 1401 (9th Cir. 1983). Legg did not appeal this Order. Legg took no action to stay or enjoin the sale to Mr. Agar which closed on January 30, 1989. Legg wasted or waived his right of access to the Appellate Court and now seeks to excuse that act by a collateral attack on the Order of December 6, 1988 (again

presumably upon still another collateral attack upon the Order for Relief).

The exception to the "mootness doctrine" cited by Legg from *In Re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988) requires two elements. The first is an appeal of the order or judgment of sale which includes the proposed transferee of the property. Legg did not appeal the order authorizing the sale to Mr. Agar. Mr. Agar was not a party to his appeals of the Bankruptcy Court Final Judgment or the District Court Final Judgment, both of which imposed a constructive trust upon the condo. The second element for the exception is a state substantive right which would survive sale, e.g., a right of redemption for a stated period. Legg's homestead right, if any, in the condo was not destroyed by the action of any court. His homestead claim was made subject to actual lien indebtedness and the constructive trust in favor of Trustee. The property was sold for a stated amount, pursuant to Court Order that was not appealed by Legg. The authorized amount was less than sufficient to discharge the valid lien indebtednesses, the unpaid taxes and the constructive trust.

Texas courts and the Fifth Circuit have long distinguished between a homestead *acquired* with fraudulently obtained money and a homestead improved or enhanced with fraudulently obtained monies. *Bush v. Gaffney*, 84 S.W. 2d 759 (Tex.Civ.App. — San Antonio 1935, no writ); *Meyers v. Baylor University in Waco*, 6 S.W. 2d 393 (Tex.Civ.App. — Dallas 1928, writ refused); *First State Bank v. Zelesky*, 262 S.W. 190 (Tex.Civ.App. — Galveston 1924, no writ); *Baucum v. Texam Oil Corporation*, 423 S.W. 2d 434 (Tex.Civ.App. — El Paso 1967, writ ref. n.r.e.); *Maryland Casualty Company v. Schroeder*, 446 S.W. 2d 117 (Tex.Civ.App. — El Paso 1969, writ ref. n.r.e.); *In re Moody*, 77 B.R. 566 (S.D. Tex. 1987). In the case of acquisition, a constructive trust is imposed upon the stolen funds which are

traced into the property purchased with such funds, here the condo.

Since Legg has not been denied his homestead right, Legg appears to again collaterally attack the jurisdiction of the Bankruptcy Court in entering the Order for Relief and in entering any and all subsequent orders, or he attacks the jurisdiction of the Bankruptcy Court to enter the Final Judgment (and presumably the District Court's affirmance) imposing the constructive trust upon his interpretation of *Granfinanciera*, supra. The Order for Relief has been upheld time after time. In Adversary No. 85-0375, Legg did not contest jurisdiction and he did not request a jury trial. Had he requested a jury trial, he *may* well have been entitled to one, but that does not mean the Bankruptcy Court has lost jurisdiction. The issue of whether the Bankruptcy Court could try a jury case on a fraudulent transfer was left open by *Granfinanciera*.

Legg did not request a jury. Legg did not appeal the Order authorizing the sale to Mr. Agar. The appeal of the Final Judgment did not include Mr. Agar as a party. Texas does not recognize any right to redeem real estate. The right of Legg to a claim of homestead remained intact to the extent that equity exceeded valid first lien indebtedness, taxes and the constructive trust. No exception to the mootness rule exists. *In Re Onouli-Kona Land Co.*, supra; *In Re Sax*, 796 F.2d 994 (7th Cir. 1986); *Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990).

The Bankruptcy Court, the District Court and the Fifth Circuit Court of Appeals have bent over backwards to allow Legg his many requested days in court. Neither the courts nor the Trustee have done anything which would deny Legg due process. There was no void order validated by any mootness doctrine. The Order for Relief has been upheld time after time after time. Jurisdiction did not evaporate by this Court's pronouncement in *Granfinanciera*, supra. The Final Judgment preserved the limited

homestead claim of Legg. The Order of December 6, 1988 authorizing the sale became final and was not appealed or stayed in any form or fashion. There is no conflict or division of opinion among the appellate courts concerning the propriety of dismissal under the circumstances of this case. Dismissal is appropriate.

CONCLUSION

The Petition for Certiorari of R. David Legg should be denied.

Respectfully submitted,

By: _____

W. STEVE SMITH

State Bar No. 18700000

Southern District I.D. No. 1694

7000 Texas Commerce

Tower

Houston, Texas 77002

(713) 221-3800

*Counsel of Record for
Respondent*



DEC 21 1990

JOSEPH F. SPANIOL, JR.,
CLERK

No. 90-646

3

IN THE
Supreme Court of the United States
OCTOBER TERM 1990

IN THE MATTER OF UNITED
MARKETS INTERNATIONAL, INC., Debtor
R. DAVID LEGG,

Petitioner

vs.

W. STEVE SMITH, Trustee,

Respondent

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

W. STEVE SMITH
WOODARD, HALL & PRIMM,
P.C.
7000 Texas Commerce Tower
Houston, Texas 77002
713/221-3935

(Application
for Admission
pending)

Counsel of Record

Attorney for Respondent,
W. STEVE SMITH, Trustee

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APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: UNITED MARKETS INTERNATIONAL, INC.	}	CASE No. 85-00872-H2-5
ESSAM OBAID, <i>et al.</i>	}	DISTRICT COURT
vs.	}	CASE
UNITED MARKETS INTERNATIONAL, INC.	}	No. MBH-85-150
<i>Debtor,</i> <i>Movants,</i> <i>Respondent.</i>	}	

ORDER APPOINTING TRUSTEE

The Motion to Appoint Trustee or, in the Alternative, an Examiner, filed by Essam Obaid and Obaid & Almulla Construction Company, Ltd. ("OBALCO") having come on for consideration before the Court, the proper notice thereof having been given, and a hearing having been held thereon on February 19 and 20, 1985, at which hearing were present and participating counsel for Movants and for Respondent, the Court finds, based upon testimony and evidence presented at such hearing, that the appointment of a trustee for the estate of United Markets International, Inc. ("UMI"), pursuant to Section 1104 of the Bankruptcy Code, would be in the best interests of the creditors and the estate of UMI for the reasons that:

- (1) there has been a sufficient showing of fraud, dishonesty, incompetence and gross mismanagement of the affairs of UMI; and

(2) the principal asset of UMI may be a cause or causes of action against R. David Legg, the president and sole shareholder of UMI, for, *inter alia*, monies transferred to him or on his behalf from UMI; and it is accordingly,

ORDERED that W. Steve Smith be, and he hereby is, appointed trustee of UMI pursuant to Section 1104 of the Bankruptcy Code, and it is further

ORDERED that the trustee secure a bond pursuant to Section 322 of the Bankruptcy Code in the amount of \$11,000.00 and evidence of the same be filed with this Court, and it is further

ORDERED that Movants, Essam Obaid and Obaid & Almulla Construction Company, Ltd., shall pay into the registry of this Court, upon further order of this Court, such amounts as shall be necessary to compensate reasonably the trustee for his services performed in this case and to compensate such professionals as may hereafter be employed by the trustee pursuant to further order of this Court, and it is further

ORDERED that such payments, to the extent not repaid to Movants, shall be first priority administrative expenses as described in Section 507(a)(1) of the Bankruptcy Code allowed under Section 503(b) of the Bankruptcy Code, and it is further

ORDERED that each of the trustee and such professionals shall be entitled to receive compensation from such funds only in the event there are insufficient assets in the estate to satisfy his application for compensation which has been approved by the Court and to the extent consistent with Sections 326, 327, 328, 330 and 504 of the Bankruptcy Code.

DATED: February 27th, 1985.

CAROLYN DINEEN RANDALL
UNITED STATES CIRCUIT JUDGE
sitting by designation

APPENDIX B

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor

CASE
No. 85-00872-H2-5

**ORDER FOR RELIEF AND
APPOINTMENT OF A TRUSTEE**

Came on for consideration the Involuntary Case: Creditors' Petition (the "Petition") filed on February 7, 1985, against the above-named Debtor, and the Consent to Entry of Order for Relief and Appointment of a Trustee signed by United Markets International, Inc. ("UMI"), and there being sufficient grounds for the relief sought in the Petition, it is accordingly

ORDERED that an Order for Relief under Chapter 11 of Title 11 of the United States Code is hereby granted with respect to UMI, and it is further

ORDERED that W. Steve Smith be, and hereby is, continued as trustee of UMI, having been appointed as Trustee on February 27, 1985 by order of this Court pursuant to Section 1104 of the Bankruptcy Code.

DATED: - March 28, 1985.

/s/ R. F. WHELESS JR.

R. F. Wheless Jr.

United States Bankruptcy Judge



APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor

CASE
No. 85-00872-H2-5

NOTICE OF APPEAL

United Markets International, Inc., alleged debtor, hereinafter appellant, appeals to the district court from the final Order for Relief entered in the above referenced matter on the 28th day of March, 1985. Appellant will show that said order was a "fraud upon the court" as defined in Rule 60(b), of the Federal Rules of Civil Procedure, and that no time limit is imposed for an appeal under such circumstances.

Appellant would show that the Court did not have subject matter jurisdiction to enter said Order, and that no time limit is imposed for asserting a claim of failure of jurisdiction.

Appellant would have said Order for Relief, and any and all actions taken pursuant thereto, declared null and void.

Appellant would show that it is entitled to damages, and remittitur of all funds and/or property wrongfully received and/or appropriated as a result of this present proceeding and all proceedings relating thereto.

The parties to the Order appealed from, their names and addresses, and/or the names and addresses of their respective attorneys are as follows:

1. Attorneys for Essam Obaid, Obaid & Almullah Construction Company:

Hutcheson & Grundy
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002

2. Attorney for W. Steve Smith, Trustee:

Barbara Rodgers
Woodard, Hall & Primm
4700 Texas Commerce Tower
Houston, Texas 77002

3. Rex Supply Company:

3715 Harrisburg
Houston, Texas 77003

4. Vasco Equipment:

501 N. Shepard
Houston, Texas 77007

5. Alltransport:

1520 Texas
Houston, Texas 77002

6. Kewaunee Scientific Equipment Co.:
505 E. North Belt
Houston, Texas 77060

Dated: May 5, 1988.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

3000 Smith Street

Houston, Texas 77006

713/521-9797

Federal Admissions No. 1414

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served upon all parties named in the attached List of Service on the 5th day of May, 1988, by placing same in the United States Mail, postage prepaid.

/s/ R. DAVID LEGG

R. David Legg

Debtor —

United Markets International, Inc.
5858 Westheimer, Suite 103
Houston, Texas 77051

Debtor's Attorney —

Ronald J. Sommers
2302 Fannin, The Gibraltar Bldg.
Houston, Texas 77002

Priority Creditors — First Class Mail

Internal Revenue Service
3223 Briarpark
Houston, Texas 77042

Texas Employment Commission
P. O. Box 2908
Austin, Texas 78769

All Secured Creditors

None

Twenty Largest Unsecured Creditors — First Class Mail

American Express

P. O. Box 13764

Phoenix, Arizona 85002-3764

DHL Airways, Inc.

Central Region

P. O. Box 38465

Houston, Texas 77238-8465

Federal Express Corporation

P. O. Box 727 Dept. A

Memphis, Tennessee 38194

General Motors Acceptance Corporation

7141 Office City Drive

Houston, Texas 77087

Vasco Automotive Equipment Warehouse Company, Inc.

501 N. Shepard Drive

Houston, Texas 77007

WAF/RMH Office I Joint Venture

Brazos Management Company

5858 Westheimer, Suite 503

Houston, Texas 77057

Warren, Gonham & Lamont, Inc.

210 South Street

Boston, Massachusetts 02111

Western Union Telegraph Co.

427 S. LaSalle Street

Chicago, Illinois 60605

Clyde Wilson International Investigative and
Securities Service

1506 Upland

Houston, Texas

Attorney for Creditors — First Class Mail

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Houston, Texas 77002

Equity Security Holder — First Class Mail

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1200 Smith Street
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Hannah Niday Flowers
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Houston, Texas 77006

Houston Fire & Safety Equipment Company
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Houston, Texas 77061

Kewaunee Scientific Equipment Corporation
P. O. Box 95973
Chicago, Illinois 60694

Pitney Bowes
P. O. Box 38390
Louisville, KY 40233-8390

RCA Service Company
P. O. Box 7780-1274
Philadelphia, PA 19182

Red Hot Documentation Consultants
P. O. Box 741091
Houston, Texas 77274-1091

Southwestern Bell Telephone
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Houston, Texas 77002

The Stephens Company
P. O. Box 14516
Houston, Texas 77221-4516

TMC/America, Inc.
3301 Airport Freeway, Ste. 222
Bedford, Texas 76021

TMC of Houston
4801 Woodway, Suite 160 W.
Houston, Texas 77056



APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

} CIVIL ACTION
No. H-88-1706
BANKRUPTCY
No. 85-00872-H2-5

ORDER

In adjudicating a bankruptcy appeal this Court must make an independent assessment of its jurisdiction. *See City of Miami v. Interstate Commerce Commission*, 669 F.2d 219, 221 (5th Cir. 1982). Having made such a determination, the Court DISMISSES this appeal for want of jurisdiction.

Pursuant to Bankruptcy Rule 8002, a notice of appeal must be filed within 10 days of entry of the appealable order. Failure to follow Rule 8002 mandates dismissal of the appeal. *Matter of Bad Bubba Racing Products*, 609 F.2d 815 (5th Cir. 1980). Appellant filed his notice of appeal on May 5, 1988. He seeks to appeal an order for relief signed March 28, 1985, and entered on April 2, 1985. The notice of appeal is not timely and this appeal must be dismissed.

Appellant argues that the appeal is timely because the March 28, 1985, order was a fraud upon the Court and this appeal is made pursuant to Fed. R. Civ. P. 60(b). He also argues that the bankruptcy court lacked subject matter jurisdiction to enter the March 28, 1985, order.

A Rule 60 (b) motion can not be used to escape the time limits for appeal. *United States v. 329.73 Acres of Land*, 695 F.2d 922, 925-6 (5th Cir. 1983). The purpose of a 60 (b) motion is to

allow the trial judge to reconsider a matter to correct obvious errors and perhaps obviate an appeal. *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). It is not a substitute for an appeal. *Id.* at 735. Appellant cannot bring this appeal pursuant to Rule 60(b). The Court also notes that an examination of the record shows no fraud on the Court took place.

It is clear that the bankruptcy court has subject matter jurisdiction over the case which is now on appeal. 28 U.S.C. § 1334(a); *see also* 28 U.S.C. §§ 151, 157. Appellant argues that the bankruptcy court lacked subject matter jurisdiction to enter the March 28 order because a trial is required before entry of the March 28 agreed order. The failure to hold a trial does not deprive the Court of jurisdiction and must be raised on timely appeal, not three years after the appeal time has run. *See Valley v. Northern Fire & Marine Insurance Co.*, 254 U.S. 348, 353 (1920).

The bankruptcy court had the authority to enter the March 28, 1985, order. 11 U.S. § 303 (h); Bankr. Rule 1013. UMI's attorney entered into an agreed order consenting to the bankruptcy proceedings. R. at 34.¹ Under Section 303(h) Judge Wheless properly entered the March 28 order without delay.

Appellant waited over three years before filing his notice of appeal. He is barred by the doctrines of laches and estoppel from now asserting that the March 28, 1985, order of relief is void. *Citation Cycle Company v. York*, 693 F.2d 691 (7th Cir. 1982).

For these reasons the Court must dismiss this appeal. Temporary Restraining Order DENIED for want of jurisdiction.

¹ The affidavit of David Unger indicates that Mr. Legg consented to entry of the March 28 order. Even if there is a dispute regarding consent, a party is bound by the acts of his attorney. *Callip v. Harris County Child Welfare*, 757 F.2d 1513, 1522 (5th Cir. 1985). Appellant cannot complain on appeal regarding the absence of his consent.

D-3

APPEAL DISMISSED.

Done at Houston, Texas, this 7th day of July, 1988.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge



APPENDIX E

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

. . }

CIVIL ACTION
No. H-88-1706
BANKRUPTCY
No. 85-00872-H2-5

NOTICE OF APPEAL

UNITED MARKETS INTERNATIONAL, INC., Appellant, appeals to the Fifth Circuit Court of Appeals from a final order of the U.S. District Court, Southern District of Texas, Houston Division.

Appellant would show that a trial is a necessary prerequisite to the entry of an order pursuant to 11 USC 303(h); further without such a mandated trial, any subsequent order is void.

Appellant would further show that subject matter jurisdiction cannot be conferred by agreement, consent, waiver, collusion or estoppel.

Appellant would further show that lack of subject matter jurisdiction is an issue that may be raised at any time.

Appellant would further show that an action to set aside a void order may be had at any time.

Appellant would further show that there was committed a fraud upon the court, and that an appeal may be had in such a circumstance without regard to limitations.

The parties to the judgement appealed from, and/or their attorneys of record are:

1. W. Steve Smith
Woodard, Hall & Primm
4700 Texas Commerce Tower
Houston, Texas 77002
2. Hutcheson & Grundy
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

3000 Smith Street

Houston, Texas 77005

Federal Admissions No. 1414

Attorney For Appellant

UNITED MARKETS

INTERNATIONAL, INC.

APPENDIX F
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2721

Summary Calendar

IN THE MATTER OF UNITED
MARKETS INTERNATIONAL, INC., Debtor
UNITED MARKETS INTERNATIONAL, INC.,

Appellant,

vs.

ESSAM OBAID, OBAID & ALMULLA CONSTRUCTION
COMPANY, LTD., and W. STEVE SMITH, Trustee,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(CA-H-88-1706)

(December 2, 1988)

Before RUBIN, REAVLEY, and JONES, Circuit Judges.

PER CURIAM:*

Over three years after the bankruptcy court entered an order for relief in an involuntary petition initiated against United Markets International, Inc., that company's president, Legg, filed,

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

in May, 1988, an appeal of that order. Although the debtor at first contested the involuntary petition, his attorney signed a pleading admitting many of its allegations and setting the stage for entry of an agreed order for relief in April 1985.

Appellant's essential contention is that this agreement to enter an order for relief was made without his knowledge or approval and constituted a fraud on the court. Legg asserts that, notwithstanding a statement to the contrary submitted by his then-attorney subject to penalties of perjury, he did not withdraw his objection to the involuntary petition. Now, after having dogged the trustee for three years and lost a lawsuit to the trustee for misappropriation of corporate funds, Legg wants to relitigate the propriety of the involuntary bankruptcy.

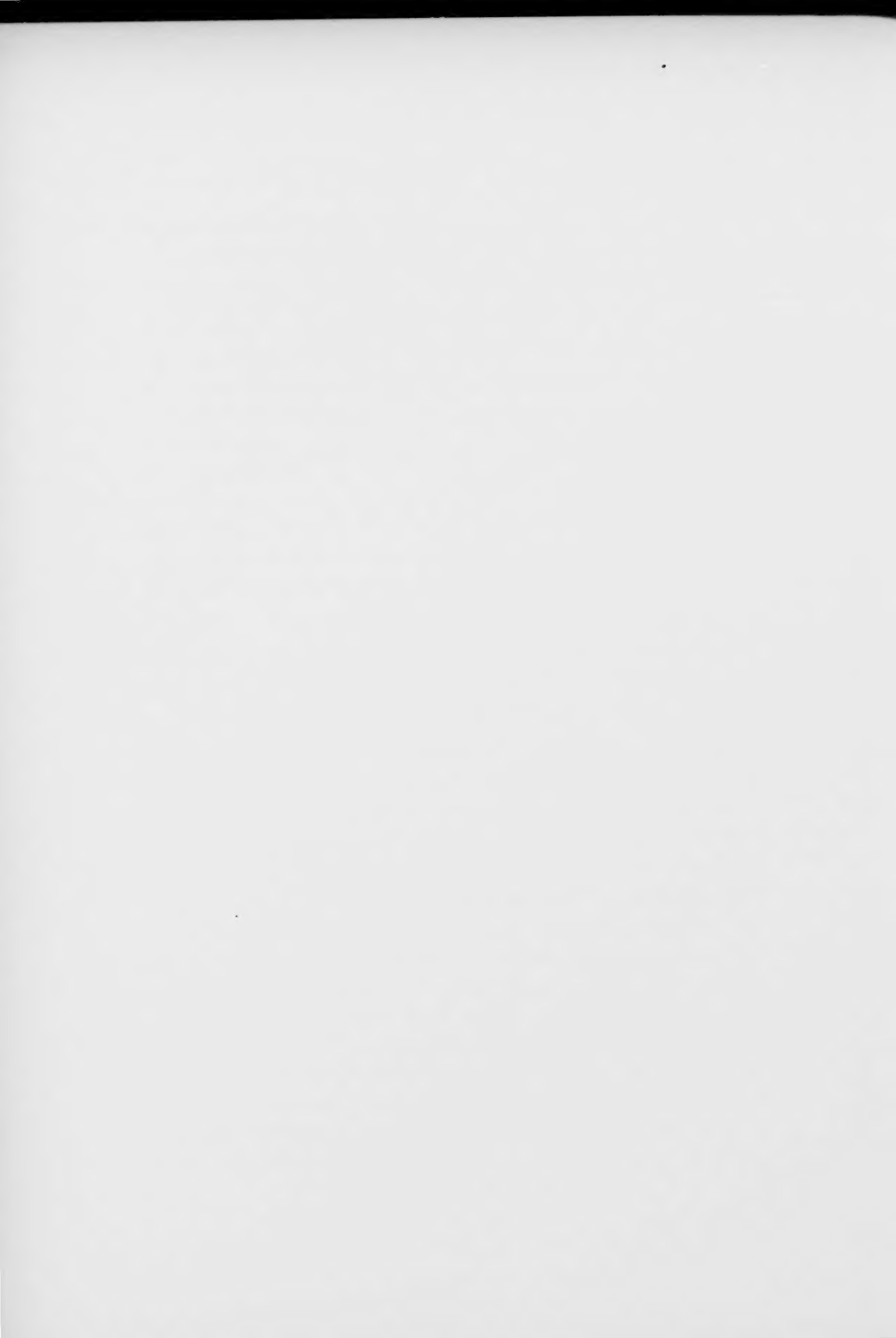
This position is untenable. As the district court found, Bankruptcy Rule 8002 requires an appeal from a bankruptcy court order to be filed within ten days of its entry. Suffice it to say this period expired long before May 1988.

Legg next asserts that he seeks relief under Federal Rule of Civil Procedure 60(b). That rule plainly does not apply to this case. Rule 60(b) is designed to seek relief from the court which rendered the judgment or order complained of, and not from another court. *Banker's Mortgage Company v. United States*, 423 F.2d 73, 78 (5th Cir. 1970). The bankruptcy court entered the order for relief, not the district court, hence the district court could not entertain a Rule 60(b) motion. Further, the district court has jurisdiction over bankruptcy court orders in two ways following the enactment of 28 U.S.C. § 158(a) in 1984. The district court must hear appeals from all final orders, judgments or decrees of the bankruptcy court, and it may, by leave, hear interlocutory appeals. Congress simply did not provide district courts the free-wheeling ability to remedy "fraud" in bankruptcy court orders that Legg seeks by filing a motion under Rule 60(b).

The district court properly held, therefore, that because Legg's appeal was untimely, it was without jurisdiction to entertain it.

We would also observe that Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this Court. *See, e.g.*, 28 U.S.C. § 1927; FRAP 38.

The judgment of the district court is *AFFIRMED*.



APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor.

CIVIL ACTION
No. H-89-3093
CHAPTER 11
BKCY. No.
85-00872-H2-5
ADVERSARY
No. 85-0932

MEMORANDUM AND ORDER

Appellant, R. David Legg, *pro se*, purportedly on behalf of United Markets International, Inc. ("UMI"), has appealed a final order issued on June 23, 1989 by Bankruptcy Judge Wheless imposing sanctions in excess of \$63,000 on Appellant. It is this order from which he appeals even though his brief contains other, unrelated issues.

One such issue concerns Judge Wheless' final Order of Relief dated March 28, 1985. That order was granted to the creditors of UMI who petitioned the court for an involuntary Chapter 11 proceeding. The record shows that Mr. David Unger, Appellant's attorney at the time, consented to the bankruptcy court's order with the knowledge and acquiescence of Appellant. Appellee's Exhibit C, p. 19. Trustee W. Steve Smith, appointed to the Estate of UMI pursuant to 11 U.S.C. § 1104, remains active in that position.

Since the final Order of Relief was entered Appellant Legg has filed two suits in federal district court and a plethora of actions in both the district and bankruptcy courts in an attempt to circumvent Judge Wheless's Order of Relief. As early as January 22, 1986 Judge Wheless, in his dismissal of one of the suits

removed to his court, admonished Appellant and his counsel for bringing meritless claims. He threatened to impose sanctions if they continued to pursue such claims. Appellant's Exhibit 8a.

However, this did not dampen the enthusiasm of Appellant Legg who continued to plague the Court with additional causes of action. On May 5, 1988 Appellant filed an appeal of the March 28, 1985 final Order of Relief, which was dismissed on July 7, 1988 by District Court Judge Norman Black for being untimely. Bankruptcy Rule 8002. The Fifth Circuit Court of Appeals affirmed on December 2, 1988. Again, Appellant Legg was admonished for his meritless claim and was threatened with sanctions. Appellee's Exhibit B6. A second District Court suit, this one including RICO allegations, was dismissed by Judge David Hittner on December 12, 1988.

On June 23, 1989, Judge Wheless ordered Appellant Legg to pay approximately \$63,000 in sanctions pursuant to Fed. R. Civ. P. 11 and Bankruptcy Rule 9011. Appellant's motion for new trial was denied and this appeal followed.

Appellant's Arguments

1. The Original Order for Relief was a legal nullity. This argument has already been decided by this Court and the Fifth Circuit Court of Appeals and therefore will not be addressed.

2. Removal of Adversary Proceeding No. 85-0932 was wrongful because the bankruptcy court lacked jurisdiction. After careful review of the record, this Court finds that the bankruptcy court had jurisdiction over Appellant's adversary proceeding pursuant to 28 U.S.C. § 157(a).

3. A bankruptcy judge has no jurisdiction to award sanctions; and appellant, as litigant, is not a proper party for assessment of sanctions. Bankruptcy Rule 9011 incorporated Fed. R.

Civ. P. 11 and permits a bankruptcy judge to sanction an attorney, the represented party, or both, as deemed appropriate.

4. The sanctions are punitive, and not rehabilitative; and appellees conduct increased fees. Bankruptcy Rule 9011 states that the court

shall impose . . . an appropriate sanction *which may include* (emphasis added) an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

It is clear from a reading of Rule 9011 that other charges may be assessed against a party in addition to attorney's fees and expenses, *e.g.* punitive fees. Further, there is no indication from either Bankruptcy Rule 9011 nor Rule 11, Fed. R. Civ. P. that rehabilitation is the sole purpose of sanctions. However, it is apparent from the record that the sanctions imposed on Appellant were an accumulation of the attorneys' fees expended by the Appellees in the numerous meritless actions instigated by Appellant. These fees have been well-documented by Appellees.

5. Judge Wheless's Order is too vague to support an award of sanctions. The records of *In re: United Markets International, Inc.* are replete with evidence supporting a sanctions order.

6. Trustee abandoned claims against OBALCO, thereby rendering MOOT sanctions against Appellant for bringing suit against Appellees. This argument is factually untrue, as Trustee Smith has sued OBALCO in Adversary Proceeding No. 87-0866 which is now pending in the United States Bankruptcy Court.

For the reasons stated above, it is ORDERED that Appellant's request for an oral hearing is DENIED. It is further

ORDERED that the Order of the United States Bankruptcy Court imposing sanctions and signed June 23, 1989 is AFFIRMED. It is further

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ORDERED that there being no further pending dispute in this case, the appeal is DISMISSED.

Signed this 7th day of March, 1990 at Houston, Texas.

/s/ NORMAN W. BLACK

Norman W. Black

United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

DAVID LEGG,

Plaintiff

vs.

UNITED MARKET
INTERNATIONAL, INC.,

Defendant.

CIVIL ACTION
No. H-90-716

ORDER

The order of the Bankruptcy Court denying Appellant's Rule 60(b) motion is affirmed.

David R. Legg, president of Market International Inc., ("MCI") is appealing an order of the Bankruptcy Court. On March 28, 1985, the Bankruptcy Court entered an order for relief from an involuntary bankruptcy petition and designated Steve Smith as trustee for the company. David Unger, MCI's attorney at the time of the involuntary petition, had agreed to the terms of the order.

In May 1987, Legg, unsatisfied with the Bankruptcy Court's ruling and with Unger's actions, filed a Rule 60(b) motion in the District Court to attack the Bankruptcy Court's order for relief. Legg argued that the Bankruptcy Court lacked jurisdiction to enter the order of relief and that Unger lacked the authority to consent to the order. In addition, Legg argued that the actions constituted fraud on the Court.

This Court dismissed Legg's appeal holding that the Bankruptcy Court had jurisdiction over the case; that a valid order had

been issued in 1985; that laches and estoppel barred Legg's appeal and that the appeal was not timely.

The Fifth Circuit affirmed the District Court's holding and admonished Legg to refrain from further attempts to escape the Bankruptcy Court's order in the following language:

We also observe that Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this Court.

Undeterred by the Court's warning, Legg filed a Motion to Vacate Void Order under Rule 60(b) again, but this time in the Bankruptcy Court. Legg was thus trying to bring his appeal of the 1985 order in the proper forum. The Bankruptcy Court dismissed his appeal, denied Legg's motion for reconsideration, and affirmed the validity of the 1985 order.

Legg's present appeal to the District Court contains essentially the same arguments as those previously raised before this Court. Legg's argument now has one additional wrinkle. Legg contends that, because his Rule 60(b) motion is the proper procedural attack on the 1985 order and the Bankruptcy Court refused to allow an adversary hearing on the validity of that order, his appeal is now properly before the District Court.

While applauding Legg's creativity, the court finds no merit to his argument. This Court now affirms the Bankruptcy Court's 1985 order once again and denies Appellant's motion for summary judgment. In addition, in light of the Fifth Circuit's admonishment and the history of the case, the Court finds that Legg's second attempted appeal is frivolous. It is further

ORDERED that Appellant's Motion to Strike is DENIED. It is further

ORDERED that Appellant's Original Motion to Supplement the Record is GRANTED with regard to all items listed on pages 2 & 3 of the motion. The motion is DENIED with regard to item #2 on page 4 of the motion, the letter from Hutcheson & Grundy. It is further

ORDERED that Appellant's Second Motion to Supplement is GRANTED with regard to item #1, a copy of the transcript of a Preliminary Hearing in the Bankruptcy case, and the motion is DENIED with regard to item #2, the series of newspaper articles.

Signed this 27th day of September, 1990 at Houston, Texas.

/s/ NORMAN W. BLACK

Norman W. Black

United States District Judge



APPENDIX I

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.
R. DAVID LEGG, *et al.*

Plaintiffs

ESSAM OBAID, *et al.*

Defendants

C.A. H-89-3093

CASE No. 85-00872-H2-5

CHAPTER 11

ADVERSARY No. 85-0932

NOTICE OF APPEAL

Notice is hereby given that R. David Legg, Appellant below, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final order denying Appellant Legg's Motion for Reconsideration, entered in this action on the 26th day of October, 1990, as well as any and all interlocutory orders entered pursuant thereto. Parties to this appeal requiring notice, their last known addresses and/or addresses of their respective counsel are as follows:

Parties notified by R. David Legg:

TIMOTHY WENTWORTH
W. STEVE SMITH
WOODARD, HALL & PRIMM, P.C.
7000 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002

THOMAS T. HUTCHESON
HUTCHESON & GRUNDY
3300 CITICORP CENTER
1200 SMITH STREET
HOUSTON, TEXAS 77002

ROBERT FINLEY
ATTORNEY AT LAW
707 TRAVIS, SUITE 1700
HOUSTON, TEXAS 77002

ESSAM OBAID
3 ALLBERT GOS
GENEVA 1206 SWITZERLAND

OBAID & ALMULLA CONSTRUCTION CO., LTD.

KHALIL AWAD
P.O. BOX 59
DUBAI, UNITED ARAB EMIRATES

P.O. BOX 15467
RIYADH, SAUDI ARABIA

DATED: NOVEMBER 26, 1990.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg, Pro Se
15415 Katy Frwy., Suite 205
Houston, Texas 77094
713/578-8829, Fed.Adm.No.1414

APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor

W. STEVE SMITH, Trustee,
Plaintiff

VS.

R. DAVID LEGG, BANCTEXAS
NORTH SIDE
HOUSTON and
HENRY HWANG,

Defendant

CASE No. 85-00872-H2-5

ADVERSARY No. 85-0375-H1

ANSWER OF R. DAVID LEGG TO TRUSTEE'S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES BANKRUPTCY
JUDGE:

Comes now, R. DAVID LEGG, (Legg) Defendant in the above styled and numbered adversary proceeding and files his Answer to Trustee's Original Complaint, and in support thereof would respectfully show the Court as follows:

1. In response to Paragraph 1 of the Trustee's Complaint, Legg neither admits nor denies the allegations contained therein.

2. In response to Paragraph 2 of the Trustee's Complaint, Legg admits the allegations contained therein.

3. In response to Paragraph 3 of the Trustee's Complaint, Legg admits that he was the President and sole stockholder of United Markets International, Inc. Legg

further admits that United Markets International, Inc. purchased all the stock of Bayou Bend Realty, Inc. and that Bayou Bend purchased real property described as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas. Legg specifically denies all remaining allegations contained in Paragraph 3 of Trustee's Complaint.

4. In response to Paragraph 4 of Trustee's Complaint, Legg admits that BancTexas Northeast Houston advanced Bayou Bend the THREE HUNDRED THOUSAND (\$300,000.00) DOLLARS cash down payment and that Bayou Bend executed its note therefor. Legg specifically denies all remaining allegations contained in Paragraph 4 of Trustee's Complaint.

5. In response to Paragraph 5 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

6. In response to Paragraph 6 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

7. In response to Paragraph 7 of the Trustee's Complaint, Legg specifically denies that the application of the Certificates of Deposit were violative of the automatic stay provisions of the Bankruptcy Code. Legg further specifically denies that the same constituted a fraud upon anyone, and further responds that Trustee has failed to allege fraud or fraudulent conduct with the degree of particularity required by Rule 9(b), Federal Rules of Civil Procedure.

8. In response to Paragraph 8 of Trustee's Complaint, Legg specifically denies the allegations contained therein.

9. In response to Paragraph 9 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

10. In response to Paragraph 10 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

11. In response to Paragraph 11 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

12. In response to Paragraph 12 of the Trustee's Complaint, Legg specifically denies the allegations contained therein.

13. Answering further, Legg moves that Trustee be required to clarify his request for relief contained in the complaint to conform to the allegations contained therein. Trustee has alleged in his complaint in Paragraph 6 that the property should be considered as property of the Debtor or *Alternatively* that the property be impressed with a resulting and/or constructive trust for the monies used to purchase same. However, in the prayer for relief the Trustee appears to be asking for both the property *and* the money used to purchase it, an inconsistent and untenable request.

14. Answering further, Legg would show that the real property in issue described in Trustee's Original Complaint as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas is now and has been at all times pertinent herein the homestead of Defendant Legg. As such homestead the same is exempt from forced sale pursuant to Article 3832 of the Revised Civil Statutes of the State of Texas and U.S. Bankruptcy Code § 522(b)(2)(A), 11 U.S.C. § 522.

WHEREFORE, PREMISES CONSIDERED, Legg prays that this Court deny the relief requested in the Trustee's Original Complaint with respect to all claims against Legg, that Trustee be directed to amend his complaint to plead any allegations of fraud with particularity, to conform his prayer for relief to the allegations of the complaint, to declare the property in issue to be the homestead of Legg and therefore not subject to this action, and for such other and further relief to which Legg may be justly entitled.

Respectfully submitted,

Law offices of

GERALD P. DE NISCO, P.C.

By /s/ GERALD P. DENISCO

Gerald P. DeNisco

5177 Richmond, Suite 1050

Houston, Texas 77056

(713) 961-5292

Texas State Bar No. 05655500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify and declare that a true and correct copy of the above and foregoing Answer of R. David Legg to Trustee's Original Complaint was mailed to all interested parties and/or counsel of record, by CERTIFIED MAIL — RETURN RECEIPT REQUESTED on this ____ day of _____ 1985.

Mr. W. Steve Smith,
Trustee
WOODARD, HALL &
PRIMM
4700 Texas Commerce
Tower
Houston, Texas 77002

Mr. Juan Csillagi,
President
BancTexas-North Side
Houston
P. O. Box 4418
Houston, Texas 77210

/s/ GERALD P. DE NISCO
Gerald P. De Nisco

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor

W. STEVE SMITH, Trustee,

Plaintiff

vs.

R. DAVID LEGG and
H. C. HWANG &
PARTNERS, INC.,

Defendants

CASE No. 85-00872-H2-5
(Chapter 11)

ADVERSARY No. 85-0375-H1

**FIRST AMENDED ANSWER OF R. DAVID LEGG
TO TRUSTEE'S ORIGINAL COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, R. DAVID LEGG, (LEGG) Defendant in the above styled and numbered adversary proceeding and files this his First Amended Answer to Trustee's Original Complaint, and in support thereof would respectfully show the Court as follows:

1. In response to Paragraph of the Trustee's Complaint, LEGG neither admits nor denies the allegations contained therein.
2. In response to Paragraph 2 of the Trustee's Complaint, LEGG admits the allegations contained therein.
3. In response to Paragraph 3 of the Trustee's Complaint, LEGG admits that he was the President and sole stockholder of United Markets International, Inc. LEGG further admits that United Markets International, Inc. in-

tended to purchase all of the stock of Bayou Bend Realty, Inc., as a subsidiary, and that Bayou Bend purchased real property described as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas. LEGG specifically denies all remaining allegations contained in Paragraph 3 of Trustee's Complaint.

4. In response to Paragraph 4 of Trustee's Complaint, LEGG admits that BancTexas Northeast Houston advanced Bayou Bend the THREE HUNDRED THOUSAND (\$300,000.00) DOLLARS cash down payment and that Bayou Bend executed its note therefor. LEGG specifically denies all remaining allegations contained in Paragraph 4 of Trustee's Complaint.

5. In response to Paragraph 5 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

6. In response to Paragraph 6 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

7. In response to Paragraph 7 of the Trustee's Complaint, LEGG specifically denies that the application of the Certificates of Deposit were violative of the automatic stay provisions of the Bankruptcy Code. LEGG further specifically denies that the same constitute a fraud upon anyone, and further responds that Trustee has failed to allege fraud or fraudulent conduct with the degree of particularity required by Rule 9(b), Federal Rules of Civil Procedure.

8. In response to Paragraph 8 of Trustee's Complaint, LEGG specifically denies the allegations contained therein.

9. In response to Paragraph 9 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

10. In response to Paragraph 10 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

11. In response to Paragraph 11 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

12. In response to Paragraph 12 of the Trustee's Complaint, LEGG specifically denies the allegations contained therein.

13. Answering further, LEGG moves that Trustee be required to clarify his request for relief contained in the complaint to conform to the allegations contained therein. Trustee has alleged in his complaint in Paragraph 6 that the property should be considered as property of the Debtor or *Alternatively* that the property be impressed with a resulting and/or constructive trust for the monies used to purchase same. However, in the prayer for relief the Trustee appears to be asking for both the property *and* the money used to purchase it, an inconsistent and untenable request.

14. Answering further, LEGG would show that the real property in issue described in Trustee's Original Complaint as Unit No. 1201, Bayou Bend Towers, Houston, Harris County, Texas is now¹ and has been at all times pertinent herein the homestead of Defendant LEGG. As such homestead the same is exempt from forced sale pursuant to Article 3832 of the Revised Civil Statutes of the State of Texas and U.S. Bankruptcy Code § 522(b)(2)(A), 11 U.S.C § 522.

15. Answering further, LEGG would show that he was the sole stockholder of United Markets International, Inc., and was thus entitled to distributions of profit earned by said corporation. Defendant LEGG would show that the Three

Hundred Thousand (\$300,000.00) Dollars held in Certificates of Deposit No. 8723 and No. 8533 at the Bank, was identified as profit. Defendant LEGG would further show that it was his intent to declare said amount to be a dividend but was unable to due to the involuntary bankruptcy.

16. Answering further, LEGG would show that the petitioning creditors in the involuntary bankruptcy were not proper creditors of the estate. As such, LEGG would show that the primary purpose of said proceedings were to hinder, delay or completely stop work on the contract.

17. Answering further, LEGG would show that as a result of the involuntary bankruptcy proceeding a trustee was appointed to manage the corporation, and said trustee is W. Steve Smith. Defendant LEGG would show that the trustee comes to this Court of equity with unclean hands in that he has failed to comply with the responsibilities and duties of a trustee in failing to pursue all causes' of actions of the estate or to protect all of its interest.

WHEREFORE, PREMISES CONSIDERED, LEGG prays that this Court deny the relief requested in the Trustee's original Complaint with respect to all claims against LEGG, that Trustee be directed to amend his complaint to plead any allegations of fraud with particularity, to conform his prayer for relief to the allegations of the complaint, to declare the property in issue to be the homestead of LEGG and therefore not subject to this action, and for such other and further relief to which LEGG may be justly entitled.

Respectfully submitted,

Law Offices of
GERALD P. DE NISCO, P.C.

By MARIO L. VASQUEZ

Gerald P. De Nisco

Mario L. Vasquez

5177 Richmond,

Suite 1050

Houston, Texas 77056

(713) 961-5292

Texas State Bar

No. 05655500

Attorneys for R. DAVID

LEGG

Of Counsel:

Mario L. Vasquez

Law Offices of Gerald P. De Nisco, P.C.

5177 Richmond, Suite 1050

Houston, Texas 77056

(713) 961-5292

CERTIFICATE OF SERVICE

I hereby certify and declare that a true and correct copy of the above and foregoing **FIRST AMENDED ANSWER OF R. DAVID LEGG** to Trustee's Original Complaint was delivered to all interested parties and/or counsel of record, by Messenger on this, the 5th day of May, 1987.

Barbara M. Rogers
**WOODARD, HALL
& PRIMM**
4700 Texas Commerce
Tower
Houston, Texas 77002

Kevin H. Bell
**SINGLETON, SINGLETON
& COOKSEY**
1950 First Western Bank Bldg.
1300 Main Street
Houston, Texas 77002

/s/ MARIO L. VASQUEZ
Mario L. Vasquez

APPENDIX K

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.

Debtor

W. STEVE SMITH, Trustee,

Plaintiff

v.

R. DAVID LEGG and

H. C. HWANG PARTNERS, INC.

CASE No. 85-00872-H2-5

ADVERSARY No. 85-0375-H1

ORDER

Came on for consideration the request of W. Steve Smith, Trustee in the above-referenced adversary to require R. David Legg to provide an accounting of funds received from United Markets International, Inc. It is therefore

ORDERED, that R. David Legg by and hereby is ordered and directed to deliver to W. Steve Smith, Trustee, 4700 Texas Commerce Tower, Houston, Texas 77002, a written detailed accounting of the receipt and disbursement of any and all funds received, transferred or otherwise removed from United Markets International, Inc. as salary, dividend, loan, payment for services rendered, legal or otherwise, said accounting to include dates, amounts, purpose of transfer or receipt of funds and eventual use of those funds; and it is further

ORDERED that R. David Legg identify and account to the Trustee for all unpaid taxes and maintenance fees on the condominium.

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Such information is to be provided on or before June 21, 1988.

SIGNED this 11th day of May, 1988.

/s/ R. F. WHELESS, JR.

R. F. Wheless, Jr.

U. S. Bankruptcy Judge

APPENDIX L
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

R. DAVID LEGG,

Appellant

v.

W. STEVE SMITH,

Appellee

CIVIL ACTION
No. H-88-2293

**APPLICATION FOR TEMPORARY
RESTRAINING ORDER
PURSUANT TO RULE 65(B)**

COMES NOW R. DAVID LEGG, Appellant in the above styled and numbered cause, and respectfully requests that this Honorable Court, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, issue a Temporary Restraining Order, restraining the imposition of a constructive trust upon, foreclosure or judicial sale of, or any interference whatsoever with Appellant's right to peaceful possession of his homestead whose legal description is Unit 1201, Bayou Bend Towers, 101 Westcott, Houston, Texas 77007.

Appellant further requests that this Temporary Restraining Order be entered pending a hearing and determination of Appellant's request for a Preliminary Injunction upon the grounds that immediate and irreparable injury, loss and damage will result to Appellant before a hearing can be held thereon.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

3000 Smith Street

Houston, Texas 77006

713/521-9797

Federal Admissions No. 1414

PRO SE

AFFIDAVIT

BEFORE ME, THE UNDERSIGNED AUTHORITY did on this date personally appear **R. David Legg**, known by me to be a credible person, who did depose and state under oath as follows:

"My name is **R. David Legg**. I am an attorney licensed to practice by the State Bar of Texas, and admitted before the United States District Court for the Southern District of Texas, and the Fifth Circuit Court of Appeals.

I am the sole owner of **United Markets International, Inc., UMI**, a Texas corporation involved in a bankruptcy proceeding which I have alleged to be fraudulent. Further, I am the owner of **Unit 1201, Bayou Bend Towers**, a condominium which is my residence, and which I claim as my homestead under the laws of the State of Texas.

An involuntary bankruptcy petition was filed against **UMI** on February 7, 1985 by two petitioners, **Essam Obaid, (Obaid)**, and the **Obaid and Almullah Construction Co. (OBALCO)**. At the time of filing, **UMI** was a solvent company having over Four Million Dollars in assets. The claims of **Obaid** and **OBALCO** were false and fraudulent, and their petition was timely controverted.

On March 28, 1985, an Order for Relief was entered against **UMI** without a trial or hearing. A collusive consent decree was entered by counsel for **UMI** without the knowledge, approval or consent of their client.

An appeal is presently pending before the Fifth Circuit Court of Appeals to set aside and vacate the void Order for Relief.

An adversary proceeding was brought by **W. Steve Smith**, Trustee alleging the homestead of **R. David Legg** to be an asset of the estate of the alleged debtor, **UMI**. Judgement in favor of **Smith** was entered May 11, 1988. This judgement is under appeal before this Honorable Court.

Urgent client matters require my absence from the country for a period of approximately two weeks. During the course of this trip, I shall be meeting with business associates abroad to discuss the possibility of their assistance in posting a bond or security, in the event such is required to stay execution of the above judgement pending appeal. I am fearful that Trustee **Smith** may attempt to

levy against my homestead in my absence, causing me and my family immediate and irreparable harm.

I urgently request that any such actions be restrained pending my return, and a hearing on the setting of a bond pending appeal."

FURTHER AFFIANT SAYETH NOT.

SWORN TO AND SUBSCRIBED before me, the undersigned authority, this 21st day of July, 1988.

/s/ R. DAVID LEGG

R. David Legg

/s/ PHYLLIS K. LAMBERT

Phyllis K. Lambert

Notary Public

APPENDIX M

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	}	
UNITED MARKETS		
INTERNATIONAL, INC.,		BANKRUPTCY CASE
<i>Debtor.</i>		No. 85-00872-H2-5
W. STEVE SMITH, Trustee,		
vs.		CIVIL ACTION
		No. H-88-2293
R. DAVID LEGG, <i>et al.</i> ,	}	

ORDER

R. David Legg's application for a temporary restraining order is denied. Identical relief was denied by Judge Black on July 7, 1988, in Civil Action No. H-88-1706. Any further duplicitous attempts to circumvent orders on unit 1201 at Bayou Bend Towers will result in the imposition of sanctions under Rule 11.

Signed on July 21, 1988, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge



APPENDIX N

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

R. DAVID LEGG,

Appellant

v.

W. STEVE SMITH,

Appellee

C.A. No. H-88-2293

**MOTION REQUESTING STAY OF EXECUTION
OF JUDGEMENT PENDING HEARING
TO SET BOND OR SECURITY;
REQUEST FOR EXPEDITED HEARING ON SANCTIONS**

COMES NOW R. DAVID LEGG, Appellant herein and files this, his Motion Requesting Stay of Execution of Judgement Pending Hearing to Set Bond or Security; Request for Expedited Hearing on Sanctions, and would respectfully demonstrate to the Court as follows:

1. Appellant has timely filed an appeal from a final order entered relating to a proceeding under Title 11 USC, pursuant to 28 USC 158(a).

2. Appellant hereby seeks a stay of said judgement in Adversary Proceeding 85-0375, appeal of which is currently under review by this Honorable Court, pending a hearing on supersedeas bond, or such security, if any, as the Court may order. Appellant would request that an expedited hearing be held on this matter at the earliest practicable time.

3. Pursuant to Rule 8, Federal Rules of Appellate Procedure, Appellant has filed this present Motion with this

Court, as it would not be practicable to seek relief from the bankruptcy court. Appellant has filed a Motion to Recuse requesting that the Honorable U.S. Bankruptcy Judge, R. F. Wheless Jr. recuse himself in said matter pursuant to 28 USC 455. A copy of said Motion to Recuse is attached herewith. Appellant has no reasonable expectation that the relief sought would be granted by the Honorable Judge Wheless. In virtually every instance, Appellant's Motions filed before the Honorable Judge Wheless have been ignored, or summarily dismissed without hearing. For over three years, said Court has ignored Appellant's claims of fraud, conversion of property of the estate, and gross mismanagement of the estate by Trustee Smith. Appellant has been threatened with "criminal contempt," and has been sanctioned, as a result of causes of action brought by counsel for Appellant — even though he had no role in the preparation or filing of said causes of action. As a result, Appellant has reason to question the impartiality of the Honorable Judge Wheless, and would expect any relief sought by Appellant to be denied.

4. Appellant had previously filed an appeal of the order for relief entered in the main bankruptcy case, 85-00872. This appeal was assigned to the Honorable U. S. District Judge Norman W. Black. The relief sought in said appeal would have vacated all judgements entered with regard to said bankruptcy proceeding. Appellant sought an injunction of enforcement of the judgement presently under appeal on that ground. Judge Black took the matter under advisement, then subsequently determined a lack of subject matter jurisdiction, and declined to consider the appeal or to grant the requested restraining order. Appellant seeks injunctive relief from this Honorable Court, as the judgement appealed from is now before this Court. The injunctive relief sought is for

the limited purpose, and limited period of time necessary to set an appropriate bond pending appeal.

5. Appellant has been admonished by this Honorable Court for filing an Application for Temporary Restraining Order, pending the setting of a bond, and warned that any subsequent similar attempt would be sanctioned. Appellant is at a loss to understand why his actions are deemed offensive, as this is the only Court from which Appellant can request the relief sought. Appellant would respectfully request of this Honorable Court an expedited hearing on Appellant's conduct that may be subject to sanction. As to all his actions, heretofore and hereafter, Appellant has and will continue to make reasonable enquiry, and will exercise due diligence and best judgement as to the applicability of existing relevant law, while vigorously defending his rights to the extent permitted by law.

6. With reference to the matter at hand, Appellant would respectfully show the Court as follows:

11 USC 541 states "(a) The commencement of a case under 301, 302 or 303 creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

At the commencement of the bankruptcy case related to the matter under review by this Court, among the property of the estate was; (a) A Six Million Three Hundred Ninety-four Thousand Dollar *Irrevocable* Letter of Credit to which the alleged debtor was the sole beneficiary, under which approximately Two Million Seven Hundred Thousand Dollars remained undrawn and to the benefit of the sole beneficiary. (b) Two

special deposit accounts containing an aggregate of approximately One Million Three Hundred Thousand Dollars, to which the alleged debtor was a joint party.

7. In over three and a half years, only *two* pre-petition, undisputed creditors have filed proofs of claim. The amounts are negligible, and were current invoices at the time of the filing of the fraudulent involuntary petition. Appellant will show this as clear and undisputable evidence that the alleged debtor was solvent, that the bankruptcy proceeding is a fraud.

8. For over three and a half years, Trustee of the estate of the alleged debtor has refused to convene a single meeting of creditors. Not one single meeting of creditors has been held to date, an extraordinary violation of 11 USC 341(a), which requires that the Trustee convene a meeting of creditors "within a reasonable time after the order for relief." Bankruptcy Rule 2003 provides a definition of a reasonable time as being "not less than 20 nor more than 40 days after the order for relief." It is now more than three and a half years after the order for relief.

9. At no time in over three and a half years have the original two fraudulent petitioning creditors, who converted over Four Million Dollars of property of the estate, been required to appear before the bankruptcy court to defend their disputed fraudulent claims. Objections to said claims have been made, and an adversary proceeding is pending on this matter before the honorable U.S. Bankruptcy Judge R. F. Wheless.

10. Should this Honorable Court decline to set a hearing on the posting of a bond or security, Appellant would respectfully request that the Court set the amount of said bond, and that said amount be set at no more than \$20,000.00. This amount exceeds the amount of pre-petition, undisputed proofs of claim presently on file in Bankruptcy Case No. 85-00872. To impose upon Appellant a bond or security so greatly in excess of any legitimate claims against the alleged debtor's estate would be inequitable and unjust.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

3000 Smith Street

Houston, Texas 77006

713/521-9797

Federal Admissions No.1414

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion Requesting Stay of Execution of Judgement Pending Hearing to Set Bond or Security; Request for Expedited Hearing on sanctions has been served upon all counsel in this matter, this 22nd day of July, 1988.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

APPENDIX O

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:
UNITED MARKETS
INTERNATIONAL INC.

CASE No. 85-00872-H2-5
CHAPTER 11

ADVERSARY
No. 85-0375-HL
and ADVERSARY
No. 87-0866
and ADVERSARY
No. 85-0932

MOTION TO RECUSE

TO THE HONORABLE U.S. BANKRUPTCY JUDGE:

COMES NOW R. David Legg, Movant and files this Motion to Recuse, and in support thereof would respectfully show:

28 U.S.C. sec. 455 provides therein as follows:

(a) Any Justice, Judge, or Magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances

(1) Where he has a personal bias or prejudice concerning a party . . .

In connection with the above matters, the Honorable R.F. Wheless Jr. has exhibited such a lack of impartiality, as well as bias and prejudice in his conduct of the above referenced

matters, and all proceedings related to Case No. 85-00872-H2-5. In support of this contention, Movant would cite the following:

(a) On March 28, 1985, Judge Wheless did deny United Markets International, Inc. (UMI), its rights to a trial on the merits, by the entry of an order for Relief, without a hearing on the controverted involuntary petition filed against UMI. This unwarranted action was highly prejudicial as to Movant, and did destroy his company, UMI. Further, said action was an abdication and abnegation of judicial responsibility by Judge Wheless, and did in fact constitute a fraud upon his own Court. *Ensminger v. Powers*, 108 U.S. 292, 2 S. Ct. 643, 27 L. Ed. 732 (1883).

(b) On January 22, 1986, Judge Wheless did threaten Movant personally, by a handwritten addendum to an order dismissing a cause of action brought by Movant's counsel in the United States District Court, stating "if the same is refiled without the permission of this Court the plaintiff and his attorney may be certified for criminal contempt". Such a threat was abusive with regard to Movant, who had no role in the preparation or filing of the offending cause of action. Further, "Where actions of parties charged with criminal contempt were not committed in presence of Court, criminal contempt would be inappropriate under 28 U.S.C sec. 1481. *Frankford Trust Co. v. Allanof*, (1983 ED Pa.), 29 B.R. 407. Said threat was illustrative of the bias and prejudice of Judge Wheless toward Movant.

(c) On September 3, 1986, Movant was personally sanctioned by Judge Wheless, for the actions of Movant's counsel in filing the above mentioned cause of action, through Movant was merely a party to a pleading prepared by Movant's counsel — without his participation; without his signature to same. Movant, as a litigant, was sanctioned. Movant's counsel of record in said matter was not.

(d) In his Findings of Fact and Conclusions of Law signed May 11, 1988, Judge Wheless did therein state "This Court does not accept Mr. Legg's credibility in connection with this matter", thereby callously disregarding Movant's testimony made under oath. Movant is an officer of this Court, a licensed and practicing attorney at law, a former staff member of several Members of the United States Congress, including the former President Pro Tempore of the United States," a former adjunct professor of law, and has never suffered such a slight to his personal and professional integrity as was inferred by Judge Wheless.

Movant alleges all of the above actions of Judge Wheless illustrate his bias, prejudice and lack of impartiality towards Movant. Such actions exceed the requirements of 28 U.S.C. sec. 455, mandating disqualification. In *U.S. v. Miranne*, (5th Cir. 1982), 688 F.2d 980, cert. denied 103 S. Ct. 736, 459 U.S. 1109, 74 L. Ed. 959, it was held, "Under this section, actual demonstrated prejudice need not exist in order for the judge to be required to recuse himself." The facts presented herein clearly warrant Judge Wheless' recusal.

WHEREFORE, Movant respectfully requests that the Honorable Judge R. F. Wheless, Jr. recuse and disqualify himself from further involvement with Case No., 85-00872-H2-5 and all adversary proceedings related thereto, and that a successor Judge be named and all related files, hearings, motions, etc. be transferred accordingly.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

3000 Smith Street

Houston, Texas 77006

713/521-9797

Federal Admissions No.1414

PRO SE

APPENDIX P

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.,
W. STEVE SMITH, Trustee,

vs.

R. DAVID LEGG, AND
H. C. HWANG & PARTNERS,
INC.

CIVIL ACTION
No. H-88-2293

ADVERSARY
No. 85-1375-H1

BANKRUPTCY CASE
No. 85-00872-H2-1

FINAL JUDGMENT

The judgment of the bankruptcy court is affirmed.

It is adjudged that:

1. The estate of United Markets International, Inc., by its Trustee, W. Steve Smith, is granted a constructive trust on Unit No. 1201, Bayou Bend Towers, Volume 117, page 24, Condominium Records, Harris County, Texas, to the extent of \$300,000.00, plus interest at 10% per year from February 5, 1985, to today, with the constructive trust being subject to the lien of H. C. Hwang & Partners, Inc.; the principal and prejudgment interest shall bear postjudgment interest at 7.90% per year.

2. R. David Legg shall deliver possession of Unit No. 1201, Bayou Bend Towers, by May 30, 1988, to the Trustee W. Steve Smith for the benefit of the Estate including all fixtures and improvements in the unit;

3. H. C. Hwang & Partners, Inc., is prohibited from foreclosure under 11 U.S.C. § 362 unless the stay should lift; and

4. All issues about fraudulent transfer, preference, unpaid tax, maintenance fee, or other claim against R. David Legg not expressly addressed in this judgment will be determined separately.

This is a final judgment.

Signed on November 9, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes

United States District Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.,
W. STEVE SMITH, Trustee,

vs.

R. DAVID LEGG and
H. C. HWANG & PARTNERS,
INC.

CIVIL ACTION
No. H-88-2293

ADVERSARY
No. 85-1375-H1

BANKRUPTCY CASE
No. 85-00872-H2-1

**OPINION ON AFFIRMANCE OF THE
BANKRUPTCY JUDGMENT**

The appellants' emergency motion to vacate judgment on appeal for failure to join indispensable parties will be denied.

The insufficiency of evidence point of error cannot be ruled on by this court because the appellant did not submit the record; therefore, the findings of fact and conclusions of law of the trial court will stand.

The appellant seriously misunderstands the indispensable party rule which is not applicable here because no other party's interests were either decreased or diminished by the occasion of this lawsuit and its judgment.

The constructive trust will be affirmed. There is a quibble about the use of the term "first." The constructive trust is subordinate to Hwang's lien whether that lien was the first or the fifteenth. Even if the language causes confusion, it is surplusage; otherwise, the order will stand.

Signed on November 9, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes

United States District Judge



APPENDIX Q

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.
W. STEVE SMITH, Trustee

vs.

R. DAVID LEGG and
H. C. HWANG & PARTNERS,
INC.

CIVIL ACTION
No. H-88-2293

ADVERSARY
NO. 85-0375-H1

MOTION FOR RECONSIDERATION PURSUANT TO RULE 59 AND 60(A) FEDERAL RULES OF CIVIL PROCEDURE

R. DAVID LEGG, Appellant moves for reconsideration of this Honorable Court's Opinion on Affirmance of the Bankruptcy Judgment and Final Judgment in the above referenced matter, and would respectfully show as follows:

1. The United States Supreme Court most recently held, in its decision pronounced June 23, 1989, in Cause No. 87-1716, styled *Granfinanciara, S.A. et al., Petitioners v. Paul C. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corporation, Etc.*, that an action by a trustee in bankruptcy, alleging a fraudulent conveyance against a party who has not filed a claim against the estate, is an action in law, not in equity, and the right to a trial by jury is protected and ensured by the Seventh Amendment to the United States Constitution. Appellant Legg had not filed a claim against the estate in this proceeding, and was entitled to a

trial by jury on the contested allegations asserted by the trustee below.

. See Affidavit of Legg attached as Exhibit "A."

2. The Supreme Court in *Granfinanciara*, supra, expressly stated, at p. 21 of the slip opinion;

There can be little doubt that fraudulent conveyance actions by bankruptcy trustees — suits which, we said in *Schoenthal v. Irving Trust Co.*, 28 U.S. at 94-95 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" — are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. See Gibson 1022-1025. They therefore appear matters of private rather than public right.

The Court further states at p. 23 of the slip opinion:

Citing *Schoenthal v. Irving Trust Co.*, supra, approvingly, we expressly stated that, if petitioner had not submitted a claim to the bankruptcy court, the trustee could have recovered the preference only by a plenary action, and that petitioner would have been entitled to a jury trial if the trustee had brought the action in federal court.

The Trustee's Original Complaint was therefore fatally defective, brought before a court without jurisdiction to hear a plenary action. Having defined a fraudulent conveyance as a "private right," the Court stated that "if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Supra*, p. 20.

3. A challenge to subject matter jurisdiction may be made at any time. *American Fire & Casualty Co. v. Finn*, (1951) 341 U.S. 6.

4. The absence of the record is not material to consideration of the threshold questions of jurisdiction raised above.

5. A copy of the record was provided to the Court, and was subsequently supplemented. See attached Exhibit "B." Apparently its absence is due to inadvertent clerical error. A true and correct complete copy will be prepared and provided without delay.

WHEREFORE, PREMISES CONSIDERED, Movant prays that this Honorable Court reconsider its opinion on Affirmance of the Bankruptcy Judgment and Final Judgment; that, upon reconsideration, the Court vacate the judgment below for want of jurisdiction, and dismiss Trustee's Original Complaint, pursuant to 12(b)(1), Fed. R. Civ. P.

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg

Attorney at Law

15415 Katy Freeway

Suite 101

Houston, Texas 77094

713/578-8829

Federal Admissions No. 1414

PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to opposing counsel this 29th day of November, 1989.

/s/ R. DAVID LEGG

R. David Legg

EXHIBIT "A"

STATE OF TEXAS

COUNTY OF HARRIS

}

AFFIDAVIT

Before me, the undersigned authority, on this day did appear R. David Legg, known to me to be a credible person, who after being duly sworn, did depose and state:

My name is R. David Legg. I am a defendant in Adversary No. 85-0375-H1 in bankruptcy Main Case No. 85-00872-H2-5.

Trustee's Original Complaint alleging fraudulent conveyance of my homestead was filed in the Spring of 1985. Trial of the Adversary was held before the Hon. R. F. Wheless, Jr., United States Bankruptcy Judge, concluding February 4, 1988. Judgment was pronounced on May 11, 1988.

At no time relevant to said proceeding, had I filed a claim against the estate in Case No. 85-00872-H2-5.

Further Affiant sayeth not.

SIGNED this 29th day of November, 1989.

/s/ R. DAVID LEGG

R. David Legg

SWORN AND SUBSCRIBED before me, the undersigned authority this 29th day of November, 1989.

/s/ DOROTHY L. SANDERS

Dorothy L. Sanders

Notary Public

EXHIBIT "B"

R. DAVID LEGG

ATTORNEY AT LAW

3000 SMITH

HOUSTON, TEXAS 77006

713/521-9797

July 22, 1988

Office of the Clerk
United States Bankruptcy Court
515 Rusk Avenue
Houston, Texas 77002

Attn: Bankruptcy Appeals Clerk, Ms. Mary Perales

Re: Bankruptcy Appeal H-88-2293, Adversary Proceeding
85-0375; Bankruptcy Case 85-00872, Chapter 11; Supplement of
Designation of Record

Ms. Perales,

With regard to the above referenced bankruptcy appeal, now pending before the Honorable Judge Lynn N. Hughes, I would like to supplement the record previously designated.

I request that a complete transcript of the hearing on Adversary Proceeding 85-0375, heard before the Honorable Judge Wheless on January 29, February 3 and 4, 1988, be furnished the District Court, by all exhibits. A portion of this transcript has been completed and is presently on file, the remainder has been ordered and is presently being transcribed.

A related appeal has recently been concluded, Civil Action 88-1706, before the Honorable Judge Black. I would request that those items in the attached designation in said appeal now be furnished to Judge Hughes' court.

Q-7

Please don't hesitate to contact me should you have any questions regarding this matter.

Thank you for your assistance.

Very truly yours,

/s/ R. DAVID LEGG

R. David Legg

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.,
W. STEVE SMITH, Trustee,

vs.

R. DAVID LEGG and
H. C. HWANG & PARTNERS,
INC.

CIVIL ACTION
No. H-88-2293

ADVERSARY
No. 85-0375-H1

NOTICE OF APPEAL

R. DAVID LEGG, Appellant, appeals to the Fifth Circuit Court of Appeals from a Final Judgment of the U.S. District Court, Southern District of Texas, Houston Division, entered November 14, 1989, affirming the decision of the bankruptcy court. A motion for reconsideration was timely filed, and the same was denied by the district court, said denial being entered in this action on January 11, 1990. This appeal is timely filed.

Appellant would show that a constructive trust may not be imposed upon a homestead, and that any attempt at such imposition is null and void.

Appellant would further show that there was no jurisdictional basis for trial of this matter by a United States Bankruptcy Judge, that any resulting judgment was thus null and void, and that by failing to address this fatal jurisdictional issue, the district court ruling affirming the trial judge is in error and warrants reversal.

Appellant would further show that Appellant had a right to trial by jury in this matter as recently propounded by the United States Supreme Court, and that by failing to address this argument, the district court erred, warranting reversal of its judgment.

Appellant would further show that the district court erred in failing to grant de novo review of this matter, and that the Findings of Fact and Conclusions of Law propounded by the bankruptcy court are null and void.

Appellant would further show that the Order for Relief in the main bankruptcy case 85-00872-H2-5 from which Adversary no. 85-0375 flows is null and void, and that any subsequent judgment emanating from the initial void order is likewise null and void and subject to collateral attack. The District Court erred in refusing to address this issue.

The parties to the final order appealed from, their names and addresses, and/or the names and addresses of their respective attorneys are as follows:

Ms. Barbara M. Rogers
Woodard, Hall & Primm,
P.C.
7000 Texas Commerce
Tower
Houston, Texas 77002

Dated: February 9, 1990.

Mr. Kevin Bell, Atty.
Singleton & Cooksey, Attys.
1600 Smith, Ste. 4500
Houston, Texas 77002

Respectfully submitted,

/s/ R. DAVID LEGG

R. David Legg
15415 Katy Freeway
Ste. 101
Houston, Texas 77094
(713) 578-8829
Fed. Adm No. 1414

APPENDIX R

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.,

Debtor.

W. STEVE SMITH, Trustee,

vs.

R. DAVID LEGG and
H. C. HWANG & PARTNERS,
INC.

CIVIL ACTION
No. 85-00872-H2-5

ADV. No. 85-0375-H1

ORDER AUTHORIZING SALE FREE AND CLEAR

At Houston came on for hearing the Motion For Authority To Sell Free and Clear filed by W. Steve Smith, Trustee herein, and R. David Legg having filed an opposition to such Motion, and the Court having considered the evidence presented and the arguments of counsel, and determining that the Motion should be in all respects granted, it is therefore

ORDERED that W. Steve Smith, Trustee for the Estate of United Markets International, Inc., is hereby authorized to sell Unit 1201 of Bayou Bend Towers, 101 Westcott, Houston, Harris County, Texas, for the cash price of \$275,000.00 to Mr. Gideon G. Agar (pursuant to contract dated November 3, 1958) and that any interest that any party might claim in the subject condomin-

ium be attached to the net proceeds from said sale, said claims including but not being limited to:

1. Lien in favor of H. C. Hwang & Partners, Inc. securing a promissory note in the original principal sum of \$115,000.00;

2. Lien filed August 2, 1988, in favor of The Bayou Bend Towers Council of Co-owners, in the amount of \$15,475.95;

3. Lien filed August 26, 1987, in favor of West Publishing Company against R. David Legg in the amount of \$2,727.40;

4. Lien filed August 31, 1987, in favor of The Bayou Bend Towers Council of Co-owners, in the amount of \$17,622.83;

5. Lien filed August 24, 1988, in favor of Matthew Bender & Company, Inc. in the amount of \$1,558.88;

6. Federal lien filed on October 26, 1988, against Robert David Legg in the amount of \$7,722.01;

7. State Tax Lien filed on July 15, 1985, in favor of Comptroller of Public Accounts, State of Texas, in the amount of \$64.02;

8. Claims asserted by R. David Legg in Adversary Proceeding No. 85-0375-HI in the United States Bankruptcy Court of the Southern District of Texas;

9. Claims asserted by any party in the lawsuit styled R. David Legg vs. Lackshin & Nathan, et al., Docket No. 88-54225, in the 127th Judicial District Court of Harris County, Texas; and

10. Claims of R. David Legg that are asserted in the Notice of Lis Pendens filed on August 5, 1988, by R. David Legg, a copy of which is attached hereto as Exhibit "A."

it is further

ORDERED that all of the claims and interests that all parties might have against the net proceeds of the sale of this property are not approved herein, but are subject to determination in the appropriate forum and proceeding prior to disbursement of the net proceeds from the sale of Unit 1201, Bayou Bend Towers, Houston, Harris County, Texas; it is further

ORDERED that unless the time is shortened for cause, sign this Order and its effect is conditioned upon the Trustee giving 20 days written notice to West Publishing Company, Matthew Bender Publishing Company and the I.R.S., and giving each of these creditors the opportunity to object or request a hearing. If none is requested then the full effect of this Order shall mature.

Dated: December 6, 1988

/s/ R. F. WHELESS, JR.

R. F. Wheless, Jr.

United States Bankruptcy Judge

STATE OF TEXAS

COUNTY OF HARRIS

} ss:

NOTICE OF LIS PENDENS

Notice is hereby given that in the United States District Court for the Southern District of Texas, Houston Division, there is pending a Civil Action entitled R. David Legg vs. W. Steve Smith, Trustee. By that suit R. David Legg asserts that certain property is his homestead under the laws of the State of Texas, and is exempt from the claims of creditors. Legg asserts the invalidity of any claims of said property being property of an estate of an alleged debtor entitled United Markets International, Inc., said estate being administered by W. Steve Smith, Trustee.

Further notice is hereby given that there is pending before the United States Court of Appeals for the Fifth Circuit, an appellate cause of action No. 88-2721 entitled United Markets International vs. Essam Obaid et al. In this action, appellant asserts as void an Order in bankruptcy entering an Order for Relief, and asserts as void the appointment of W. Steve Smith as Trustee.

The property in question with regard to these proceedings is described as:

UNIT NUMBER 1201, BAYOU BEND TOWERS,
HOUSTON, HARRIS COUNTY, TEXAS.

The return of said property to its rightful owner of record, R. David Legg is sought in both said proceedings.

Signed this 5th day of August, 1988.

/s/ R. DAVID LEGG

R. David Legg
Attorney for United Markets
International, Inc., and Pro
Se Counsel for R. David Legg

STATE OF TEXAS

COUNTY OF HARRIS

} ss:

BEFORE ME, the undersigned authority personally appeared R. David Legg, Attorney for United Markets International, Inc., and Pro Se Counsel for R. David Legg, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 5th day of August, 1988.

/s/ CAROL WADE WILSON

Carol Wade Wilson
Notary Public in and for the
State of TEXAS

My commission expires:

Carol Wade Wilson

12-31-88

(print name)

Return to:

R. David Legg
Attorney at Law
3000 Smith Street
Houston, Texas 77006



APPENDIX S

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN RE:
UNITED MARKETS
INTERNATIONAL, INC.,
Debtor.
W. STEVE SMITH, Trustee,
Movant

v.

BAYOU BEND TOWERS COUN-
CIL OF CO-OWNERS, H. C.
HWANG & PARTNERS, INC.,
DANIEL, MANN, JOHNSON &
MENDENHALL, SINGLETON &
COOKSEY, ASIAN AMERICAN
NATIONAL BANK, INTERNAL
REVENUE SERVICE, MATTHEW
BENDER & CO., INC., AND
WEST PUBLISHING CO.

Respondents

CASE No. 85-00872-H2-11

CHAPTER 11

CONTESTED
MATTER

AGREED ORDER

Came on this date for hearing in the above-entitled and numbered cause the following described matters:

1. Trustee's Motion to Determine Interest in Proceeds;
2. H. C. Hwang & Partners' Motion to Compel Distribution of Proceeds;
3. Daniel, Mann, Johnson & Mendenhall's Motion to Compel Distribution of Proceeds;

4. Bayou Bend Towers' Counsel of Co-owner's Motion for Allowance of First Priority Claim;

5. Asian American National Bank's Motion to Intervene in H. C. Hwang & Partners' Motion to Compel Distribution of Proceeds; and

6. Application for Payment of Administrative Expenses.

The Court, after reviewing the various motions, responses and pleadings, and after the presentation of evidence and arguments of counsel, finds that the Internal Revenue Service, Matthew Bender & Co., Inc. and West Publishing Co. did not respond to assert an interest in the proceeds that are the subject of the Trustee's Motion to Determine Interest in Proceeds and that the other parties to the various motions are in agreement that pursuant to its Order granting the Trustee authority to sell the condominium commonly known as Unit 1201 of Bayou Bend Towers, Houston Texas, free and clear of liens; that such sale closed on January 30, 1989 and resulted in net cash proceeds in the sum of \$225,311.06, together with accrued interest, which funds are currently in the possession of the Trustee, W. Steve Smith; and that the cash proceeds should be distributed to the respective parties in the sums which follow. It is therefore,

ORDERED that distribution of the cash proceeds on deposit with this Court be as follows:

1. The sum of \$46,500.00 to the Trustee, W. Steve Smith;

2. The sum of \$157,500.00 to H. C. Hwang & Partners, Inc., by virtue of its valid first lien, to be distributed in the respective sums and following priority:

(a) \$17,500.00 to Daniel, Mann, Johnson & Mendenhall;

(b) \$30,000.00 to Singleton & Cooksey; and

(c) \$110,000.00 to Asian American National Bank;

3. The sum of \$24,000.00 to Bayou Bend Towers' Council of Co-Owners;

4. Any sums remaining after payment of the foregoing shall be paid to the Trustee, W. Steve Smith; it is further

ORDERED that the Internal Revenue Service, Matthew Bender & Co., Inc. and West Publishing Co. have no interest in the subject proceeds.

SIGNED this 18th day of June, 1989.

/s/ R. F. WHELESS, JR.

R. F. Wheless, Jr.

Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

**SINGLETON & COOKSEY WOODARD, HALL &
PRIMM, P.C.**

By: KEVIN H. BELL

Kevin H. Bell

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MOSECH E. SPANIOLO, JR.
CLERK

NO. 90-646

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

v.

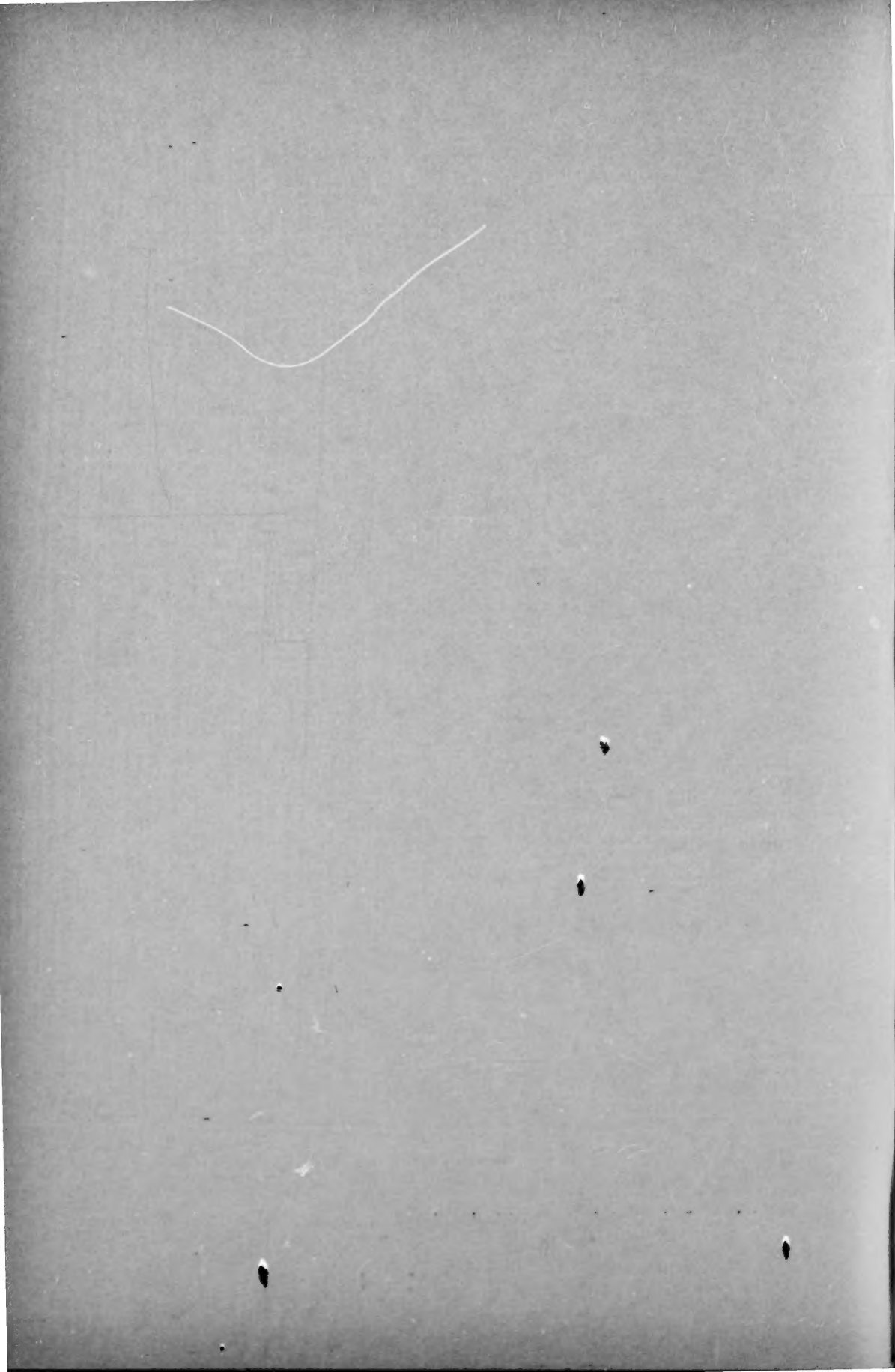
W. STEVE SMITH, Trustee,
Respondent.

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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*Counsel of Record for
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January 1991



QUESTIONS PRESENTED

1. Does state law provide an exception to the "mootness doctrine" applied to 11 U.S.C. § 363(m) where a party has been denied his right to a hearing in which to post a supersedeas bond to stay execution pending appeal, and the subject property has been sold pursuant to bankruptcy court order, where applicable state substantive law would have deprived the bankruptcy court of authority to approve the sale, and under relevant state substantive law, the bankruptcy trustee had no legal title to convey, thereby rendering the sale null and void ab initio?

2. Does the right of access to the courts and due process guarantees of the Fifth Amendment ensure appellate review of issues of failure of due process and want of subject matter jurisdiction notwithstanding alleged "mootness" pursuant to 11 U.S.C. § 363(m)?

3. Does 11 U.S.C. § 363(m) override a century of precedent which provides that a sale of property subject to execution for judgment pending appeal does *not* render such appeal moot, as property sold may be recovered?

II

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NO. 90-646

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

v.

W. STEVE SMITH, Trustee,
Respondent.

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

PETITIONER'S PRELIMINARY STATEMENT

Petitioner Legg has endeavored to limit the scope of his Petition to the infirmities of 11 U.S.C. § 363(m) as they relate to an appeal of a final order from a bankruptcy court. Respondent Smith has attempted to expand this Court's review to include six years of litigation which is a jurisdictional and constitutional nightmare. Legg

objects to Smith's Appendix to his Brief in Opposition which contains irrelevant documents extraneous to the record of the matter under review. Appendices G, H and I are not proper for inclusion in this Petition, or for consideration by this Court. Since Smith is Trustee of United Markets International, Legg also objects to him representing the estate as Attorney of Record herein.

Petitioner also notes that Respondent Smith has failed to serve the Solicitor General of the United States as required by Supreme Court Rule 29.4(b), and said Opposition should be stricken.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent Smith has offered no reason for refusing the Writ, has identified no perceived misstatement of fact or law, and has failed to address the issues raised by Petitioner Legg. Smith has admitted that a conflict exists among the Circuits as to the application of substantive states rights to the "mootness doctrine" applied to 11 U.S.C. § 363(m).

Smith fails to address the relevant issues as presented in Legg's Petition, and cites no authority controverting the issue that state substantive law provides an exception to the "mootness doctrine" as applied to 11 U.S.C. § 363 (m). In fact, Smith recognizes the existence of such an exception, but erroneously states that *In re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988) "requires two elements" for its application. See Respondent's Brief at page 8. To the contrary, the Court held therein at p. 1173, "If such rights [i.e. state substantive rights] would survive the sale of property in state court, they should survive the sale in bankruptcy court as well,

regardless of whether an appellant failed to comply with bankruptcy procedure requiring a stay of the sale itself." (emphasis added). Neither Legg's failure to obtain a stay, nor his failure to appeal a bankruptcy court's void procedural order approving sale, deprived him of the application of state substantive rights and an exception to the mootness doctrine. Albeit incorrect, Smith's argument is that Legg's case *on its merits* would not qualify for a state substantive law exception to the mootness doctrine; but to determine this, one must *reach the merits*. The Fifth Circuit failed to reach these merits under the "no exception" rule to § 363(m).

Legg *did* appeal the proper final judgment entered in Adversary No. 85-0375-H1 in an effort to save his homestead, and that judgment is the subject of this Petition. Pursuant to this judgment, the Bankruptcy Court below imposed an invalid constructive trust upon and authorized the seizure of Legg's homestead. Legg was dispossessed of his home at gunpoint. *Prior* to the seizure and as admitted by Smith, Legg filed a motion to stay execution of the Bankruptcy Court's final judgment before the District Court where his appeal was pending, as permitted by Fed. R. Bankr. P. 8005 which is analogous to FRAP 8(a), stating that he had no reasonable expectation that the relief sought would be granted by the Bankruptcy Court. *See* Appendix N-2 to Respondent's Brief in Opposition. Further, while his motion to stay was pending and *prior* too the "sale" of the property, Legg filed an emergency motion before the District Court, notifying the Court of the imminent sale of his homestead. *See* Appendix A-1 of this Reply. Neither of Legg's motions were ever ruled upon by the District Court; Legg did everything within his power to get the court's

attention. 11 U.S.C. § 363(e) was totally ignored by the Bankruptcy and District Courts below.

The Bankruptcy Court's Order of December 6, 1988, authorizing Trustee's sale of Legg's homestead was, pursuant to Texas law, a *void order* and is *subject to collateral attack in any court at any time*. The constructive trust imposed upon Legg's homestead was an invalid lien, null and void under the Constitution of the State of Texas, Art. XVI § 50. *Matter of Daves*, 770 F.2d 1363 (5th Cir. 1985). Smith had no rights in the property which he could convey to a subsequent purchaser, *Burkhardt v. Lieberman*, 138 Tex. 409, 159 S.W.2d 847 (1942), and the Bankruptcy Court had no property before it which sale it could legally authorize. There is no appeal from a void order; it is a legal non-entity. Smith's "sale" of the property was a "pretended sale" of the homestead and was void. The "purchaser" of Legg's homestead, Gideon G. Agar, had both *actual notice* and *constructive notice* of the defects in the "sale." He is a trespasser under Texas law, and as such, he is not an indispensable party to the proceeding below. But *again* this goes to the *merits* of the case below, which the strict application of § 363(m) has precluded.

At page 8 of his Opposition, Smith attempts to divert this Court's attention from the issue of illegal seizure and sale of a homestead by rationalizing that he discharged a valid first lien with a portion of the proceeds. Subsequent disposition of proceeds from an invalid sale of exempt property is irrelevant. There are only three valid liens recognized by the Texas Constitution subjecting a homestead to seizure, and a constructive trust is *not* one of them.

There was never an allegation, nor any finding below, that the funds used to purchase Legg's homestead were "stolen funds" as inferred by Smith. See Findings of Fact, No. 41, Appendix D-8, and Conclusions of Law No. 1, Appendix D-12 to Petition for Writ of Certiorari. Texas courts specifically hold that disposition of property subject to execution by creditors for the purpose of procuring a homestead is *not deemed a fraud upon creditors*, and that in Texas all or part of one's property can be used to procure a homestead, even if such action is for the purpose of delaying and defrauding creditors. *In re Moody*, 77 B.R. 566 (S.D. Tex. 1987) at 577, citing *Swayne v. Chase*, 88 Tex. 218, 30 S.W. 1049 (1895); and *National Liberty Ins. Co. v. Merkur*, 29 F. Supp. 280 (S.D. Tex. 1939) (emphasis added).

Smith admits that Legg was a non-debtor party who had not filed a claim against the estate. His statement that Legg had not raised the issue of jurisdiction before the Bankruptcy Court is erroneous, as the transcript of the hearing illustrates at pp. 31-33, and moreover is irrelevant as jurisdiction may be raised at any time, even on appeal. Texas substantive law also holds that an action against a homestead is one at law, and is *not* triable before a bankruptcy court. Under application of federal or state law, Legg was entitled to a trial before an Article III district judge, and Smith's filing of this case before a bankruptcy court was a fatal jurisdictional defect. The orders of a court acting beyond its jurisdiction are absolutely void. *Even if* Legg did not demand a jury trial (which demand would have been futile), this fact alone does not magically convert an action at law to one in equity triable to a bankruptcy court.

Smith's statement that the courts below have "bent over backwards to allow Legg his many requested days in court" is refuted by the record below. No hearing was granted Legg by the District Court on his motion to stay, or his emergency motion; neither motion was ever even ruled upon, although Legg's motion to stay was properly filed *six months* prior to the "sale" of his homestead. Then, *without de novo review*, the District Court refused to consider the merits of Legg's appeal though it had remained pending for one and a half years. Thereafter, claiming his appeal as "moot" since his homestead had been sold in the interim, the Fifth Circuit refused consideration of the merits of the case below. Grave jurisdictional and void order issues were ignored. The record below is replete with denials of due process of law, *however*, the due process denial relevant to this Petition is that committed pursuant to 11 U.S.C. § 363(m) which denies review of jurisdictional and substantive state law issues when strictly applied.

Questioning the jurisdiction of the bankruptcy court is Legg's right, if not his obligation. Whether or not the case below was within the bankruptcy court's jurisdiction may be considered by this Court along with the § 363(m) issues, and Petitioner Legg would urge consideration of same since the lower courts have been unwilling to face this issue.

The inception of the bankruptcy main case is suspect from even the most cursory glance at the transcript of the ex parte "trial" on the controverted involuntary petition compromising claims in excess of two million dollars by unverified "agreed order" submitted by counsel for the alleged creditors without counsel for the alleged debtor being present in court. *See* Appendix B-1 of this Reply. However, that matter is the subject of a separate appeal.

As raised by Smith, the Bankruptcy Court asserted jurisdiction over a related district court case sounding in contract and tort filed by Legg's previous attorney, dismissed the case and sanctioned Legg *personally* for the acts of his counsel. That matter is also under separate appeal and is not before this Court. Therein the Hon. R. F. Wheless, Jr., Bankruptcy Judge, states that his court has powers equal to an Article III district court. To quote his Honor, ". . . the distinction between the Bankruptcy Court and the United States District Court is a distinction without a difference. . . ." *Even more* disturbing, his Honor states with reference to jurisdictional differences between the two courts, "I've ignored it and plan to continue to ignore it until some Court says I'm dead wrong. . . ." This transcript excerpt is set forth at Appendix C-9a to this Reply.

Of concern in the case at bar is not merely this bankruptcy judge's *sua sponte* assumption of jurisdiction beyond his statutory limitations, but the refusal of the appellate courts to review jurisdictional challenges. In *Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990) the Fifth Circuit refused consideration of jurisdiction below, citing the absolute nature of the "mootness doctrine" applied to 11 U.S.C. § 363(m). In the case at bar, the Fifth Circuit refused to apply its own holdings to the absolute protection given a homestead under the Texas Constitution. To "pretermite" the issue of jurisdiction, due to an alleged "mootness" of the appeal is as disturbing as the destruction of substantive states rights by a federal bankruptcy court. For these reasons, the granting of Petitioner's Writ of Certiorari is imperative.

Finally, parties aggrieved under § 363(m) who have had the last of their possessions—their exempt property

—wrongfully seized and sold by a bankruptcy court will *rarely* have either the fortitude or financial ability to endure three appellate levels to reach this Court. It is likely that this Court will see few meritorious cases such as the one presented by Petitioner.

CONCLUSION

Petitioner Legg prays that a writ be GRANTED.

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*Counsel of Record for
Petitioner and Pro Se*

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. H-88-2293
JUDGE HUGHES

BANKRUPTCY CASE NO. 85-00872-H2-5
ADVERSARY NO. 87-0375

IN RE:
UNITED MARKETS INTERNATIONAL, INC.
Debtor

**APPELLANT'S EMERGENCY MOTION
REQUESTING LEAVE TO FILE SUPPLEMENTAL
BRIEF, AND REQUEST FOR STATUS**

1. Appellant filed his initial brief in the above appeal on July 18, 1988.
2. Appellee responded with a Motion to Dismiss this appeal.
3. No judgment has been pronounced in this appeal since filing of Appellee's Motion.
4. A review of microfilm records in the District Clerk's office revealed an entry that this file was "closed" July 26th, 1988. There exists no evidence of entry of judgment to this effect.
5. Ms. Carol Wilson, a paralegal in the office of attorney George M. Bishop, telephoned Ms. Mary Gage, the Court's case manager at Appellant's request. Ms. Gage stated, after a review of the file, that it had not been dismissed, that any reference in the District Clerk's micro-

film records to the case being closed was in error, that it may have been stayed pending the outcome of a related appeal then before the Fifth Circuit.

6. The present appeal involves disposition of fundamental rights of Appellant, including his right to a homestead exempt from claims of creditors, a right which the Fifth Circuit has held to be "absolute," and which may be allowed in full regardless of a debtor's intent. *See Matter of Moody*, 77 B.R. 566 at 578 (S.D. Tex. 1987). There exists an urgent necessity for determination of this matter as there is an imminent possibility of Appellant's homestead—from which he was evicted in August 1988—being sold without appellate review of his claimed rights under the Constitution of the State of Texas.

7. Appellant was unable, due to severe financial limitations to timely obtain a copy of the transcript of the hearing below within the time for filing his initial brief. The transcript has since been obtained, and Appellant would respectfully request leave of Court to file a supplemental brief with appropriate references to the transcript supporting his appellate argument.

8. Finally, Appellant would respectfully request a declaration by the Court of the status of this case.

Respectfully submitted,

By: /s/ R. DAVID LEGG

R. David Legg

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Federal Admissions No. 1414

PRO SE

3a

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on opposing counsel this 17th day of January, 1989.

/s/ R. DAVID LEGG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. H-88-2293
JUDGE HUGHES

BANKRUPTCY CASE NO. 85-00872-H2-5

IN RE:
UNITED MARKETS INTERNATIONAL, INC
Debtor

ORDER

CAME ON Appellant's Emergency Motion Requestion Leave to File Supplemental Brief, and Request for Status, and the Court, finding good and sufficient reason for granting same, does hereby GRANT said Motion. Appellant shall have ____ days from the entry of this order to file a supplemental brief in this matter.

SIGNED this ____ day of _____, 1989.

By: _____
United States District Judge

APPENDIX B

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CASE NO. 85-00872-H2-5

**HOUSTON, TEXAS
MARCH 28, 1985
9:00 A.M.**

UNITED MARKETS INTERNATIONAL INC.

**HEARING ON INVOLUNTARY PETITION
BEFORE THE HON. R. F. WHELESS, JR.,
U. S. BANKRUPTCY JUDGE**

APPEARANCES:

**Hutcheson & Grundy
ROBERT G. RICHARDSON
3300 Citicorp Center
Houston, Texas 77002
(713) 951-2800**

Court Recorder

**G. MARTIN
PREPARED BY:
A WORD ABOVE, INC.
8600 Jameel, Suite 170
Houston, Texas 77040
(713) 690-1000**

**Proceedings recorded by electronic sound recording,
transcript produced by transcription service.**

THE COURT: I have on the docket this morning at nine a hearing on the Involuntary Petition in United Markets International. Are you all here in that matter?

MR. RICHARDSON: Yes, Your Honor, at least I know a number of us are. Bob Richardson of Hutcheson & Grundy representing the — two of the petitioning creditors.

THE COURT: Is anyone here representing United Markets?

MR. RICHARDSON: Your Honor, we have received a call this morning from the attorney for United Markets, David Unger, who advised us that he was prepared to consent to the relief. We had sent one of the lawyers in our firm over to him this morning to execute such a consent and we are waiting for her to get back. I have — I have forms of orders both incorporating his consent and — and just a form of order appointing — I mean seeking the relief without the consent. Your Honor, I might also add this case — and I don't know how much is aware of the background, but there is a—

THE COURT: I am aware of the background.

MR. RICHARDSON: Trustee that's been appointed.

THE COURT: I — I've talked to Judge Randall and reviewed the file thoroughly. Let me tell you what I'm going to do. Judge Stein is not here and he was — he came down to take the miscellaneous docket from me in order to allow me this day and tomorrow for some other special things, including this. And the docket is set at nine o'clock. He won't be here till ten. I think what I'm going to do is recess you all for at least thirty minutes, and I'm going to go and call the docket on the miscellaneous docket in Court One. In the meantime, if

you get that consent and an order, just bring it in there to me and I'll sign it. If you don't, I'll be back in here and if we have to go to trial, I will.

MR. RICHARDSON: Thank you, Your Honor.

THE COURT: So I'll recess now for thirty minutes.
(Recess)

THE COURT: Somebody suggested a minute ago that I wasn't really a Judge, I was a doctor going from one cubicle to another. (Laughter)

MR. RICHARDSON: Your Honor, would—

THE COURT: I just can't charge like that.

MR. RICHARDSON: Your Honor, we just a few moments ago received a consent from Mr. Unger with some very minor changes from the form that I suggested. May I approach the bench with the consent and the proposed order?

THE COURT: Yes, thank you.

(Pause)

THE COURT: All right. That's been entered. I'm very pleased.

MR. RICHARDSON: Thank you, Your Honor. May we be excused?

THE COURT: Yes, Sir.

(End)

I hereby certify that the foregoing is a correct transcript from the electronic sounding recording of the proceedings in the above entitled matter.

/s/ Sharon Bowen 4/7/89

APPENDIX C

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED MARKETS INTERNATIONAL, INC.

**ADV. NO. 85-0932-H2
HOUSTON, TEXAS
SEPTEMBER 3, 1986
10:00 O'Clock A. M.**

**BEFORE THE HON. R. F. WHELESS,
U. S. BANKRUPTCY JUDGE**

APPEARANCES:

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SARAH STONE

Court Recorder:

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PREPARED BY:
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Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

(Excerpt of transcript beginning at page 57, line 2
through page 59, line 7)

Q. —first filed in the United States District Court for
the Southern District of Texas, removed on November
12, 1985 to the Bankruptcy Court?

A. Yes Your Honor.

Q. Now—and I might say I have written an opinion
about that. I'm aware of the fact thaat the 1984 amend-
ments makes removals to the District Court, but here in
the Southern District of Texas, we have one clerk. We
are an arm of the District Court. The District Court has
referred all related to matters to the Bankruptcy Court.
There's no difference between a—let's talk about a re-
moval from the State Court so we don't get confused
by the fact that this comes out of the District Court—

A. Yes sir—

Q. —but to analogize, if a case was removed from
the District Court to the "Bankruptcy Court" as op-
posed to removal to the District Court as the statute
states, the case would go to the same clerk. It would

be styled United States Bankruptcy Court for the Southern District of Texas instead of the United States District Court and as a result would be practically funneled to the bankruptcy judges for consideration and would be given a bankruptcy number. But we're simply an adjunct or unit of the United States District Court. The United States District Court is the Bankruptcy Court. To remove a case to the Bankruptcy Court is to remove it to the District Court. So at least in the Southern District of Texas, the distinction between the Bankruptcy Court and the United States District Court is a distinction without a difference in my opinion and so the problem if there is a problem with the 1984 amendments and removals of cases to the United States Bankruptcy Court constitutes a distinction without a difference and for that reason, I've ignored it and plan to continue it until some Court says I'm dead wrong and those have to be dismissed. Some Courts take that position and I would point out that that operates not only in ignorance—what I believe to be in ignorance of the true facts, that is to say the case gets exactly where it's supposed to get without any added confusion of having a title of United States District Court at the top of it who would give it a District Court number, then it would have to be renumbered when it came down here and it would be because there's a standing order to that. And so its a merry-go-round which seems to me to be a technical one—let's say highly technical in terms of there being a difference. It's much more practical that it comes straight here which is where it belongs. It goes to the same clerk. We're a unit of that Court and nothing more and nothing less. So it is in the United States District Court for the Southern District of Texas. The same thing is

true when it's removed from a United States District Court. It then takes the case upon proper removal as a Bankruptcy Court and then by order—by standing order of reference is supposed to go to the United States Bankruptcy Court or to the Bankruptcy judges for determination so I don't see any difference myself. If that's an aspect of the Motion to Remand, you've now gotten my comments on it—

A. Yes sir—

APPENDIX D

Federal Rule of Bankruptcy Procedure 8005

STAY PENDING APPEAL

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be requested, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

STAY OR INJUNCTION PENDING APPEAL

FRAP 8

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court: Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

